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No. (1)

Supreme Court, U.S.
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In the

Supreme Court of the United States

LOUISE PARTH, individually
and on behalf of all others similarly situated,
Petitioner,

v.

POMONA VALLEY HOSPITAL MEDICAL CENTER,
a California corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 16, 2011

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QUESTION PRESENTED

1) Whether an employer subject to the Fair Labor Standards Act can pay a reduced hourly rate to employees who work schedules that require overtime pay in order to make the employees' overtime work "budget-neutral" to the employer, so that employees who perform the same duties make the same gross wages whether they choose to work overtime or non-overtime schedules.

PARTIES TO THE PROCEEDING

The parties below are listed in the caption. In addition, California Hospital Association and the Secretary of Labor appeared as amicus curiae.

RULE 29.6 STATEMENT

Pomona Valley Hospital Medical Center, Inc. has no parent corporation and does not issue stock. Amicus Curiae, California Hospital Association, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Louise Parth respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at --- F.3d ----, 2010 WL 5064380 (9th Cir. December 13, 2010). (App. 1a-21a.) It was filed on November 18, 2010 and amended on December 13, 2010. The Order of the U.S. Court of Appeals for Ninth Circuit denying Parth's Petition for Panel Rehearing and Rehearing *En Banc* is not reported. (App. 71a-73a.) The memorandum of the United States District Court for the Central District of California granting summary judgment is not reported. (App. 22a-70a.)

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 13, 2010. (App. 74a-75a). It denied Ms. Parth's Petition for Panel Rehearing and Rehearing *En Banc* on November 18, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 29 United States Code, Section 207(a)(1)

"Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the

production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Title 29 United State Code, Section 207(j)

"No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed."

Title 29 Code of Federal Regulations, Section 778.316

"While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully

agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked."

Title 29 Code of Federal Regulations, Section 778.104

"The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40 . . . ."

Title 29 Code of Federal Regulations, Section 778.601(d)

"If the parties have the necessary agreement or understanding to use the 14-day period, computation of overtime pay on the workweek basis as provided in section 7(a) is not required . . . However, under the provisions of section 7(h) and 7(e)(5) of the Act, any payments at the premium rate for daily overtime hours within such period may be credited toward the overtime compensation due for overtime hours in excess of 80."

INTRODUCTION

The court of appeals' decision allows employers subject to the Fair Labor Standards Act ("FLSA") to implement wage agreements to avoid the labor costs mandated by the Act's overtime requirements. The decision stands in direct conflict with three separate FLSA-related Supreme Court decisions, and threatens to nullify the Act, which now covers 130 million workers. The court of appeals noted that courts "around the country have dealt with similar matters, with conflicting results." In being the first ever Circuit Court of Appeals to uphold such a wage agreement, the court of appeals has upended the jurisprudence that this Court carefully developed to guard the broad public policies at work in the Act, which are rooted in the health and well-being of workers and in the protection of the U.S. economy. This Court has held that the dual policies of the Act are effectuated "by increasing the employer's labor costs by 50%" for overtime work, which incentivizes the employer to "employ more men" and compensates employees "for the burden of a long workweek." The Act forbids the use of wage agreements that "negate the statutory purposes." The Act's guarantees may not be waived by agreement, and it must "be liberally construed to apply to the furthest reaches consistent with Congressional direction."

In the case at bar, Pomona Valley Hospital Medical Center ("PVHMC") pays a reduced hourly rate to employees who work overtime schedules, and what it terms a "non-reduced 8-hour rate" to everyone else. The court of appeals recognized that employees subject to this practice therefore "make approximately the

same amount of money as they made" for a non-overtime schedule.

Section 7(a) of the Act requires employers to pay overtime premium pay for hours worked in excess of 40 in a workweek. 29 U.S.C. § 207(a). The court of appeals incorrectly assumed that PVHMC needed to pay employees reduced rates to avoid overtime costs associated with 12-hour shifts. As the district court noted, Section 7(a) does not require the payment of daily overtime, including for 12-hour shifts, provided that overtime is paid for work in excess of 40 hours in a workweek; and, PVHMC appreciated this fact because it employed some 12-hour employees (who are not part of this case) who were paid the non-reduced 8-hour rate and who were not paid daily overtime. (App. 42a, fn 58.) But for the employees affected by this case, PVHMC did not want to be subject to the weekly overtime limits of Section 7(a).

Section 7(j) of the Act exempts hospitals that utilize a 14-day work period from the hour/overtime requirements of Section 7(a), so long as the employee receives overtime compensation "for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period." 29 U.S.C. § 207(j); 29 C.F.R. § 778.601. In other words, the additional scheduling flexibility[1] provided by Section 7(j) comes with an important trade-off: Employers must pay overtime for work beyond 8 hours in a day. PVHMC also admits that it did not want to pay affected

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[1] For example, depending on the needs of the hospital, an employee could work ten (10) eight hour shifts in any combination in a 14-day period without an overtime requirement.

employees the increased labor costs associated with daily overtime under Section 7(j).

The court of appeals upheld PVHMC's budget-neutral plan, finding that it does not violate the FLSA, and that it "incentivizes PVHMC from overworking its nurses." (App. 13a.) The court of appeals misperceived this Court's doctrine, finding that there is no "relevant case law to support [the] argument" that these wage agreements violated the FLSA. It made a policy decision that PVHMC's "actions seem perfectly reasonable," and upheld the practice because it was "the result of a bargained-for exchange" that allowed affected employees to work 12-hour shifts.

The court of appeals' decision therefore presents a matter of national interest, and the most fundamental challenge to the FLSA and its underlying policies in 65 years. Its decision affects each of the 130 million workers who are now subject to the Act, because it allows employers to use such practices to escape the weekly overtime requirements in Section 7(a) or the daily overtime requirements in sections like Section 7(j). The decision allows employers to avoid the very thing that the FLSA requires – higher labor costs for overtime work – and to neutralize the sole mechanism that the FLSA relies upon to effect its policies. By allowing employers to remove the financial incentive to spread employment, the decision also undermines the FLSA's goal of reducing our nation's unemployment, a policy of particular concern to the approximately 14.5 million workers who are currently unemployed. In doing all of this, the court of appeals has effectively rewritten the FLSA for its own policy reasons.

Ms. Parth seeks certiorari because of the important questions as to whether such wage agreements comply with the requirements of Section 7(a) or Section 7(j) of the Act.

STATEMENT OF THE CASE

1. The facts in this case are undisputed. In the past, employees at PVHMC worked 8-hour shifts. In about 1990, PVHMC attempted to institute an alternative workweek schedule ("AWS") through which some employees could work 12-hour shifts at straight-time pay. (*See, e.g.*, App. 42a, fn. 58.) As the district court noted, under the FLSA, employees can work 12-hour shifts without overtime because Section 7(a) does not include a maximum daily hours requirement. (*Id.*) But under California law, which has a daily overtime requirement, establishing an AWS required an affirmative vote of at least 2/3 of the affected employees. (*Id.*) PVHMC held a vote with selected employees, and the majority voted against instituting an AWS.

For the class of employees affected by this case, PVHMC operates under a 14-day work period pursuant to Section 7(j). PVHMC entered into written employment contracts with employees who wanted to work 12-hour shifts, providing for a reduced rate of pay, but also providing that affected employees would still make what the hospital called "the non-reduced 8-hour rate" for everything else, such as working extra shifts and for benefits.[2] Employees who remained in

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[2] In the written agreements, PVHMC stated that "[a]ll vacation, holiday, sick and weekend premium pay will be paid at the

8-hour shift positions performed the exact same duties as 12-hour shift employees, but retained the non-reduced 8-hour rate for all purposes. To calculate the reduced rate for 12-hour shift employees, PVHMC lowered the 8-hour rate by just enough so that their gross wages, even after PVHMC performed an overtime computation, would be equivalent to making the non-reduced 8-hour rate for all regular and overtime hours. PVHMC admitted that it used the reduced rate practice so that its labor costs would not increase when affected employees work shifts that require overtime under the FLSA.[3]

Twelve-hour shift employees were shown their higher rate in recruitment, and could transfer to an 8-hour shift job classification with a corresponding rate

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employee's non-reduced rate," as was "Paid Time Off" and jury service pay.

[3] A hypothetical employee making $20/hour provides a good illustration of how this works in practice. Under Section 7(a), the employee could work an 8-hour shift and make $160 ($20 x 8 hours) or a 12-hour shift and make $240 ($20 x 12 hours). A hospital employer can make an election under Section 7(j), triggering daily overtime. A $20/hour employee who works a 12-hour shift would then make $280, including overtime. This equates to 8 hours at $20/hour ($160) and 4 hours at overtime rate of $30/hour ($120). While PVHMC operated under Section 7(j), it also reduced the $20/hour rate by 15 percent, to a reduced rate of $17.13/hour for the hypothetical employee. When the hypothetical employee would work a 12-hour shift under PVHMC's practice, the employee would make regular wages of $137.04 ($17.13 x 8) and overtime wages of $102.78($25.69 x 4), for a total of approximately $240. This still equates to $20/hour for a 12-hour shift ($240 ÷ 12 = $20/hr). For working an extra shift and for benefits, or when the employee transfers to an 8-hour shift position, the employee would still make $20/hour.

increase to the non-reduced 8-hour rate.[4] Because 12-hour and 8-hour shift employees earned the same gross wages, one PVHMC official admitted that "their salaries equaled out for the amount of hours...in essence, they did not make two different rates of pay. They made the same amount for hours worked." PVHMC also admitted that the non-reduced rate was the "employment" rate for 12-hour shift employees, which PVHMC testified was "what our offer rate would be, their hourly rate they would be receiving upon working at the hospital."

In about 2003, PVHMC nurses voted to unionize. Ms. Parth was a member of the bargaining team. In negotiations, the bargaining team asked PVHMC to stop using the reduced rate practice. PVHMC refused to do that, admitting that it did not want to risk incurring weekly or daily overtime liability. PVHMC employees could work five 12-hour shifts (60 hours) in a seven-day period without a real increase in compensation. The reduced rate practice allowed PVHMC to avoid increased labor costs associated with overtime work in excess of 40 hours a week *or* 8 hours a day. The reduced rate practice continued without discussion and without change.

2. Ms. Parth filed this collective and class action against PVHMC on July 27, 2006. Invoking jurisdiction pursuant to 28 U.S.C. § 1331, Ms. Parth claimed that the reduction itself was illegal and that the practice, as implemented, was artificial under the

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[4] If "an employee...wishes to revert back to an 8 hour workday...the hospital will make every effort to accommodate the request..."

FLSA, directly applicable Supreme Court precedent, and pertinent federal regulations. On July 9, 2007, after finding that Ms. Parth met the requirements of conditional class certification for purposes of the FLSA, the district court found that "judicial efficiency would best be served if the court-facilitated notice were delayed until after the court hears and decides a motion for summary judgment on the legality of PVHMC's pay plan." On September 25, 2007, Defendant filed a motion for summary judgment under Federal Rules of Civil Procedure, Rule 56(c). On December 5, 2007, the district court granted PVHMC's motion, and judgment was entered on December 31, 2007.

3. Ms. Parth filed a Notice of Appeal on Decembe[illegible] 27, 2007. The court of appeals originally filed an opinion on October 22, 2009, reported at 584 F.3d 794. Petitioner timely filed a Petition for Rehearing with Petition for Rehearing *En Banc* on November 9, 2009. On June 23, 2010, the United States filed its amicus curiae brief recommending against the Petition for Rehearing with Suggestion for Rehearing *En Banc*. On November 18, 2010, the court of appeals withdrew the opinion dated October 22, 2009, and filed a different opinion that is not reported. Also on November 18, 2010, the court of appeals denied the Petition for Rehearing with Suggestion for Rehearing *En Banc*. (App. 71a-73a.) On December 13, 2010, an amended opinion was filed, reported at --- F.3d ----, 2010 WL 5064380 (9th Cir. December 13, 2010). (App. 1a-21a.) It also filed a Mandate that stated: "The judgment of this Court, entered November 18, 2010, takes effect this date." (App. 74a-75a.)

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE NINTH CIRCUIT DECISION AND THREE SEPARATE SUPREME COURT FLSA-RELATED DECISIONS.

This Court's FLSA-related jurisprudence was established to protect the far reaching and significant policies of the Act. The Act is now threatened by payroll practices designed to avoid the additional labor costs associated with the FLSA, by the possibility that employees might be asked to waive the protections conferred by Congress, and by the possibility that courts might narrowly construe the Act to protect employers rather than its intended beneficiaries. Standing in direct conflict with this Court's FLSA-related jurisprudence, the court of appeals' decision threatens the Act itself.

A. The Ninth Circuit's Decision Directly Conflicts With Supreme Court Precedent Of *Walling v. Youngerman-Reynolds Hardwood Co, Inc.*, 325 U.S. 419, 423 (1945).

The court of appeals' decision conflicts with this Court's decision in *Youngerman-Reynolds* in three material respects.

First, in *Youngerman-Reynolds*, an employer subject to the FLSA purported to reduce the hourly rate for employees so that it experienced no increased labor cost when employees worked overtime. In rejecting the practice, this Court rested its decision on

the FLSA's purpose of increasing labor costs to spread employment and to compensate employees for working long hours. The Court rejected the proposition that "by a mere label respondent would be enabled to nullify all the purposes for which Section 7(a) was created." *Id.* at 425-26. Specifically, by "increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden a long workweek." *Id.* at 423-424.

Second, overtime must be calculated on what is commonly referred to as the "regular rate." *See* 29 U.S.C. § 207(a); 29 U.S.C. § 207(e). The Supreme Court has defined the regular rate as "the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co, Inc.*, 325 U.S. 419, 424 (1945). PVHMC's 12-hour shift employees were scheduled to work 12-hour shifts, and their wages were computed at the reduced rate. The court of appeals treated the reduced rate as though it were the "rate actually paid employees for the normal, non-overtime workweek." This was erroneous. These employees were not scheduled to work 8-hour shifts, nor did they.[5] If a 12-hour employee wished to work 8-hour shifts, the employee could transfer to an 8-hour job classification and would then make the non-reduced 8-hour rate. Thus, under *Youngerman-*

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[5] PVHMC admitted that "nurses aren't called off because Pomona is consistently busy . . . ."

Reynolds, the court of appeals should have required PVHMC to calculate overtime on the rate class members made for 8-hour shifts, not at the lower rate that was in fact only paid for overtime work. *See also*, 29 C.F.R. § 778.316 ("where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours"). By evaluating the validity of PVHMC's overtime computation with reference to what is paid for an overtime shift rather than a non-overtime shift, the court of appeals allows PVHMC to escape the labor costs required by the Act.

Third, while endorsing broad freedom of contract in the employment relationship, the Supreme Court held that "this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Id.* at 424. The court of appeals upheld the practice even though PVHMC admitted that its practice was intended to be cost neutral, and 12-hour shift employees were recruited with the non-reduced rate and paid the non-reduced rate for all other purposes. The court of appeals did not discuss PVHMC's admissions that all other employees in the hospital who perform the same duties made the non-reduced rate, that the non-reduced rate was the "employment rate," or that there really were not two different rates of pay for employees who work overtime or non-overtime schedules. Ms. Parth argued that PVHMC's "intent" to negate the statutory purposes presented a triable issue that prevented summary judgment. In ruling on summary judgment, the district court held that the intent of the PVHMC's

practice was irrelevant. While the court of appeals implicitly adopted this holding, the intent of the plan is relevant precisely because this Court has deemed it so.

B. A Decision of the Eleventh Circuit Court Of Appeals Supports Ms. Parth's Interpretation Of This Court's Decision In *Youngerman-Reynolds*.

Ms. Parth is not alone in her view that *Youngerman-Reynolds* forbids employers subject to the FLSA to adopt budget-neutral plans. In *Wethington v. City of Montgomery*, 935 F.2d 222 (11th Cir. 1991), the Eleventh Circuit relied on *Youngerman-Reynolds*, to find that rate reductions to avoid the FLSA's overtime obligations can only be accomplished before the employer is subject to the FLSA. In *Wethington*, firefighters challenged a pay practice similar to the one adopted by PVHMC. The challenge failed solely because the rates of pay were lowered during the grace period before state and municipal employers became subject to the FLSA. *Wethington*, 935 F.2d at 229.[6] The court held "it is not a violation of the Act to reduce, prior to the effective date of the Act, the hourly rate paid employees in order to avoid greater

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[6] The FLSA did not originally apply to state or local employers. *Wethington*, 935 F.2d at 222. In 1974, Congress expanded their definition of "employer" to include municipalities. In *Garcia v. San Antonio Metro. Transit Autho.*, 469 U.S. 528, 533 (1985), this Court reversed previously established precedent and held that state and local governments could be liable for FLSA violations. *Id.* at 224-25. In response to *Garcia*, Congress delayed application of the FLSA to municipal employers until April 15, 1986. *Id.* at 225.

payments upon application of the FLSA." *Id.* at 229. However, the Court noted that such rate reductions occurring after the effective date of the FLSA would be invalid: The "[Supreme] Court's holdings do suggest that, had the original calculation occurred subsequent to the Act, it would be invalid." *Id.* at 227. The court explained:

> "Had the Act applied at that time, that is, had it applied upon issuance of the *Garcia* mandate, this salary conversion would have produced a regular rate higher than that adopted by the City. In addition, the calculation of the regular rate would have had to comport with the actual hour requirement, and thus the fictional increase of overtime hours would not have been permitted." *Id.* at 227-228.

Similarly, the Fifth Circuit Court of Appeals upheld a rate reduction practice solely because the employer implemented the practice before the FLSA became effective for municipal employers. *York v. City of Wichita Falls*, 48 F.3d 919, 923 (5th Cir. 1995) ("Clearly, the City's May 1985 adjustment in bookkeeping was allowed by the Congressional amendment of the FLSA following *Garcia*."). One district court invalidated a reduced rate practice

implemented *after* the effective date of the FLSA;[7] another district court upheld such a practice.[8]

C. The Ninth Circuit Upheld Reduced Rate Practice Because Employees Agreed, Which Is In Direct Conflict With This Court's Decision That The FLSA's Guarantees To Individual Workers May Not Be Waived By Agreement.

This Court has held that the FLSA's guarantees to individual workers may not be waived, including through collective bargaining. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 745 (1981). The Ninth Circuit upheld PVHMC's practice because it was "the result of a bargained-for exchange." (*See, e.g.*, App. 14a.) In its analysis, the court of appeals relied on those passages from *Walling v. A.H. Belo Corp.*, 316

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[7] In *Rhodes v. Bedford County*, 734 F. Supp 289 (E.D. Tenn. 1990), the district court struck down a similar practice. The employer lowered the base rate after the effective date of the FLSA so that "workers [were] paid the same amount for the same number of hours worked both before and after the changeover." *Id.* at 292. The court found that "[o]vertime must be paid in money not arithmetic," and that defendant's alteration of pay rates was "a scheme intended to avoid the overtime requirements of § 7." *Id.* The decision in *Rhodes* was cited approvingly by *Wethington*. *Wethington*, 935 F.2d at 228.

[8] In *Conner v. Celanese, Ltd*, 428 F.Supp.2d 628, 637 (S.D. Tex. 2006), the district court upheld such a reduced rate practice without discussion or analysis of the underlying requirements or policies of the FLSA, or discussion of related precedent, including *York v. City of Wichita Falls*, 48 F.3d 919 (5th Cir. 1995), a decision within its own Circuit.

U.S. 624 (1942),[9] *Youngerman-Reynolds*, and the amicus briefing of the Department of Labor, which emphasized freedom of contract in the workplace.

In *Belo*, this Court decided whether the FLSA allows an employer to establish a guaranteed salary for employees who work wildly fluctuating hours. It is therefore inapposite to the case at bar. Moreover, while this Court upheld the practice, it did so in part because the Act did not prohibit such arrangements when implemented before the effective date of the FLSA:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act." *Id.* at 630.

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[9] In *Belo*, the Court upheld a dual payment system for jobs that had irregular hours that operated as follows: By the terms of the employment contract, there existed a specified regular rate wage and overtime pay that was one and one-half times the regular rate. This regular rate and overtime would apply to a worker's hours if he worked more than 54 hours in a given week. If he worked 54 hours or less, a fixed amount would be paid that equaled the regular rate plus overtime for the 54 hours. Payment plans which set a regular rate and guarantee a fixed rate that is never less than the regular rate plus overtime for the hours actually worked were specifically approved in 1949 by Congress for certain situations. *See* 29 U.S.C. § 207(f).

In a similar vein, the court of appeals relied on *Youngerman-Reynolds*, which said that an employer and employee "are free to establish this regular rate at any point and in any manner they see fit." (App. 12a-13a.) (citing *Youngerman-Reynolds*, 325 U.S. at 424.) But this Court simultaneously established a vital qualification: "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Id.* at 424. In *Youngerman-Reynolds*, while employees apparently agreed to the budget-neutral plan instituted by the employer, this Court invalidated the plan because it negated the labor costs associated with FLSA's overtime requirements.

The court of appeals found further support from the Department of Labor, adopting the test proposed by the Department. According to the Department, reduced rates are bona fide if they are: "1) agreed to by the employee; 2) in place for a substantial period of time; and, 3) equal to or in excess of the Act's minimum wage." (App. 16a-17a.) While the rationale of the Department's second requirement is unclear, whether an employee can agree to budget-neutral plans only begs the question of whether such plans negate the policies of the FLSA. What the employee agrees to with respect to the rights conferred by the FLSA is irrelevant.

The holding in *Barrentine* is essential because workers are vulnerable to undue influence with respect to such practices, especially in an economy marked by fears created by widespread unemployment. The potential vulnerability of workers is highlighted by what happened here. After workers

voted against working straight-time 12 hour shifts, PVHMC instituted its reduced rate practice to accomplish the same result. Over time, many departments at PVHMC exclusively recruited 12-hour shift employees, who therefore only had the option of accepting the practice or not accepting work. Then, in 2003, when the union asked PVHMC to discontinue the reduced rate practice because it was concerned that the practice was not legal, PVHMC refused, admitting that it did not want to jeopardize any of the cost-neutral benefits the practice offered. The fact that the union capitulated on this point – and did so despite its concerns about the legality of the practice – demonstrates why the rights conferred by Congress through the FLSA cannot be trusted to waiver through collective bargaining. Finally, if the employees at PVHMC were vulnerable to this practice, then other segments of our workforce will be more vulnerable, including the unemployed whose benefits have lapsed, the aged and the disabled, and immigrant workers who will go along with any abusive practice for fear of losing their jobs.

D. The Ninth Circuit's Decision Is In Direct Conflict With This Court's Decision That The Act Must Be Liberally Construed.

The court of appeals' decision is also in direct conflict with this Court's decision in *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959), which holds that the FLSA must be "liberally construed to apply to the furthest reaches consistent with Congressional direction."

It was for Congress to define what work requires the payment of overtime, and those decrees must be

liberally interpreted for the protection of workers. Once Congress has spoken, the court cannot revise a statute to promote what it perceives as a more appropriate consequence. *See Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984) ("The relevant question is not whether, as an abstract matter, the rule advocated by petitioners accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment of [the statute]. Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.")

It was not for the court of appeals to rewrite the statute to allow employers to reduce hourly rates to escape Congress' overtime mandate, simply because the court found that "PVHMC's actions seem perfectly reasonable." (App. 14a.) The court of appeals incorrectly believed that a reduction in hourly rates was necessary for PVHMC to accomplish its stated goal of providing 12-hour shifts that were budget-neutral. (*Id.*). The district court itself acknowledged that this was not the case. (App. 64a, fn 85.) Even had the court of appeals been correct – that is, even if reduced rates were the only way to work overtime shifts without the payment of actual overtime wages required by the FLSA – the court of appeals was not authorized to make policy and rewrite the statute. Congress decreed that employers subject to Section 7(a) must pay overtime for hours worked after 40 in a workweek; and it decreed that those subject to Section 7(j) must pay overtime for hours worked in excess of 8 in a day. And so they must.

No one of course challenges the right of affected employees to work 12-hour shifts, which Ms. Parth and

many of her colleagues prefer. Under Section 207(a), PVHMC could have legally allowed affected employees to work 12-hour shifts they desired, and experience no increase in labor costs. PVHMC admitted it did this very thing with certain employees who are not subject to this action. Or, PVHMC and employees could agree to operate under a 14-day work period under Section 7(j) as long as they respected its daily overtime requirement. What PVHMC cannot do, and what a liberal interpretation of the Act forbids, is the use of reduced rate practices to circumvent the express requirements of the Act.

II. THE COURT OF APPEALS' DECISION NULLIFIES THE ACT AND ITS UNDERLYING POLICIES, AND THREATENS THE ACT'S SURVIVAL

The Congressional purpose in enacting Section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944); *see also*, *Overnight Motor Transport, Co. v. Missel U.S.*, 316 U.S. 572, 577-578 (1942) (overruled on other grounds). The FLSA rises and falls on the imposition of an actual financial penalty for overtime work, which this Court has acknowledged:

> "by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of

> work and to employ more men and of compensating the employees for the burden of a long workweek." *Youngerman-Reynolds*, 325 U.S. at 423-424.

But PVHMC admits that its practice renders its payroll accounts immune from the additional labor costs associated with overtime work. In allowing this, the court of appeals' decision nullifies the Act, including the requirements of Section 7(a).

A. The Court Of Appeals' Decision Nullifies The Act's Goal Of Preventing (Or At Least Compensating For) Overwork, And Nullifies Its Purpose Of Incentivizing The Spread Of Employment.

The court of appeals incorrectly found that PVHMC's budget-neutral plan "properly incentivizes PVHMC from overworking its nurses." In reality, any employer who adopts a reduced rate practice is no longer subject to any financial incentive to limit an employee's hours of work, and is quite literally freed from the Act. The employer can then require its employees to work schedules that require more or less overtime work, at the employer's sole discretion. The amount of overtime required will depend on assorted factors having nothing to do with the Act or its policies: the vulnerability of the particular worker or workforce; the relative bargaining strength between employer and employee; and various market forces or the economic conditions of the employer.

The nullification of the Act was at work in this case in at least two ways. First, by removing a financial

penalty associated with overtime, such practices allow employees to work more hours without "compensating the employees for the burden of a long workweek." *Youngerman-Reynolds*, 325 U.S. at 424. Here, the court of appeals incorrectly believed that PVHMC's practice forbade affected employees from working extra shifts unless there was an emergency. (App. 13a.) That is both incorrect, and, more importantly, irrelevant. PVHMC admitted that "PVHMC provides [a financial incentive] to work shifts in excess of their minimum commitment." (App. 36a, fn 43.) But the real problem is much larger than what happened at PVHMC: Even if PVHMC did have such a policy, not all companies would. And that exposes the real problem with removing the financial penalties from the Act: Budget-neutral plans incentivize overwork; and, employers will be left to regulate themselves with respect to the FLSA's requirements.

Second, under PVHMC's practice, employees can work six 12-hour shifts in a 7-day (not just 14-day) day period, without an actual increase in compensation to the employee (or an increase in labor costs to the employer). PVHMC admitted that employees "stack" their 12 hour shifts in a seven-day period; and it admitted that it refused to abandon the practice because it did not want to risk losing the budget-neutral advantages of its practice.

That these practices nullify the Act can be further demonstrated with a hypothetical based on 29 C.F.R. § 778.601(d). Employers are not required to "pyramid" the payment of overtime. *Id.* ("any payments at the premium rate for daily overtime hours within such period may be credited toward the overtime compensation due for overtime hours in excess of 80.")

For example, if an employee works five 12-hour shifts in a given 7-day period (60 hours), the same employee would be paid straight time on the reduced rate for 8 hours of each of the five shifts (40 hours) and overtime at the diluted rate for 4 hours of each of the five shifts (20 hours). Because of the rule against pyramiding overtime, if that same employee worked five 12-hour shifts in the next week, the employee would again receive straight time on the reduced rate for 8 hours for each shift (40 hours), and overtime on 4 hours per shift (20 hours). The district court failed to account for this fact, and incorrectly believed that "overtime [in the second week] would be due after less than two days of work." (App. 64a, fn 85.) In fact, even though the employee would have worked 120 hours in a 14-day period, 40 hours of that work would already be subject to an overtime calculation, albeit on a reduced rate designed to avoid any increase in labor costs. Because overtime would be calculated on the reduced rate, the employee would receive the same gross wages as if she had been paid the non-reduced 8-hour rate for each hour worked. In fact, in the hypothetical discussed by the district court (App. 64a, fn. 85), the employee would not receive more than the non-reduced 8 hour rate for each hour worked until after the 120th hour of work in a 14-day period.

In a similar vein, the lack of a financial penalty to the employer for overtime work nullifies the Act's purpose of "employ[ing] more men" and women. *Youngerman-Reynolds*, 325 U.S. at 424. The court of appeals neither discussed nor explained how PVHMC's budget-neutral plan was consistent with the policy of incentivizing the employer to spread employment to a greater number of workers. It is self-evident that these two things are inconsistent.

B. The Decision Nullifies Section 7(A)'s Requirement Of An Overtime Premium For Work In Excess Of 40 Hours In A Workweek.

The court of appeals' upholding of the use of reduced rate practices is not just limited to the millions of workers in the healthcare industry. The decision allows any employer to adopt a budget-neutral practice, whether it's intended to avoid the labor costs required by Section 7(a) or Section 7(j). This is demonstrated by the court of appeals' reliance on amicus briefing by the Department of Labor.

The Department has condoned similar budget-neutral practices that allow employees to work in excess of 40-hours in a workweek without an increase in labor costs. (App. 76a-78a.) In one opinion letter, the Department condoned a reduced rate practice to allow employees to work 36 hours in one workweek, and 48 hours in the following workweek, without any increase in labor costs to the employer. (*Id.*) This is not consistent with the plain language of the FLSA, and it highlights the absurd results that flow from these practices: In exchange for working 4 hours shy of 40 in one workweek, the Department allows the employee to work twice that amount over 40 the following workweek, without the payment of increased compensation.

This violates the plain meaning of the FLSA. The Act does not allow other industries to utilize 14-day work periods; in fact, it prohibits them. Relevant federal regulations confirm this:

> "The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40." 29 C.F.R. § 778.104.

Both the Department's opinion letter and the court of appeals' decision are therefore in direct conflict with the FLSA. The Department's opinion letter also illuminates Ms. Parth's concern about the consequences of such practices: Once a reduced rate practice is implemented, there is no financial incentive protecting the employees from overwork. In its opinion letter, the Department upheld a practice where employees could work 84 hours in a 14-day period – 4 more hours than would have been allowed under Section 7(j) – without any increase in hourly compensation to the employees. While that alone demonstrates the infirmity of such plans, it is worth noting that there is nothing – other than an employer's preference – to prevent it from requiring affected employees to work perhaps 90 hours in the next 14-day period.

The court of appeals would deem this consistent with the FLSA, even though an employer's payroll account would be immunized from the additional labor costs associated with overtime, as long as the employer actually performs the overtime computation on the reduced rate.

CONCLUSION

This case presents a watershed event for the FLSA. The broad public policies that Congress achieves through the FLSA are now deeply woven into our social and economic fabric. Practices like the one condoned by the court of appeals are an acute threat to those rights, and to the millions of workers affected by the Act. The rationale of the court of appeals' decision – allowing employees to work desired shifts – is a euphemism for allowing workers to work overtime schedules without overtime pay. The sanctioning of budget-neutral plans to accomplish such a result will provide a strong temptation for any employer to adopt one. If this petition is denied, employers will assume that this Court has also sanctioned such practices. The impact and potential confusion and inconsistency will be felt broadly, even though Congress strove to achieve a uniform national labor policy through the FLSA. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978).

Ms. Parth therefore respectfully requests that the Supreme Court grant review of this matter.

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APPENDIX

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55022
D.C. No. CV-06-04703-MMM

[Filed December 13, 2010]

LOUISE PARTH, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

POMONA VALLEY HOSPITAL MEDICAL CENTER, a California corporation,
Defendant-Appellee.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted
April 13, 2009—Pasadena, California

Filed November 18, 2010
Amended December 13, 2010

Before: William C. Canby, Jr., Johnnie B. Rawlinson, and Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith

COUNSEL

Frank J. Coughlin, Santa Ana, California, for the plaintiff-appellant.

Richard J. Simmons, Douglas R. Hart, Jason W. Kearnaghan and Beth Anne Scheel, Sheppard, Mullin, Richter and Hampton LLP, Los Angeles, California, for the defendant-appellee.

M. Patricia Smith, Solicitor of Labor; William C. Lesser, Acting Associate Solicitor; Paul L. Frieden, Counsel for Appellate Litigation; and Dean A. Romhilt, Attorney, United States Department of Labor, for the Secretary of Labor as amicus curiae.

ORDER

The Opinion filed November 18, 2010, slip op. 18571, and appearing at 18586, is amended as follows:

1. At slip op. 18586 n.3:

   Delete <the> between <to meet> and <three factors>

Add <are> between <reduced rates> and <bona fide>

Capitalize <Court> after <decision of this>

Add <en banc> after <panel rehearing nor>

Delete <en banc> between <rehearing> and <is warranted>

n.3 should now read:

The Department's amicus brief (which was submitted at our request in connection with a petition for rehearing) concluded:

> The Hospital's reduction of the nurses' regular hourly wage rates does not appear to be designed to circumvent the Act's overtime requirements and appears to meet three factors identified by the Department for ensuring that reduced rates are bona fide. Furthermore, the panel's decision does not conflict with a decision of the Supreme Court or a decision of this Court. Therefore, neither panel rehearing nor rehearing en banc is warranted.

OPINION

N.R. SMITH, Circuit Judge:

When an employer changes its shift schedule to accommodate its employees' scheduling desires, the employer may reduce the employee pay rate to pay its employees the same wages they received under the former schedule, so long as the rate reduction was not

designed to circumvent the provisions (including overtime) of the Fair Labor Standards Act ("FLSA").

1. BACKGROUND

Pomona Valley Hospital Medical Center ("PVHMC") is a hospital located in Pomona, California that has at all relevant times been an "employer" subject to the FLSA. The FLSA requires an employer (such as PVHMC) to pay its employees at one-and-one-half times the employees' "regular rate" for any "employment in excess of eight hours in any workday and in excess of eighty hours in [a] fourteen-day period." 29 U.S.C. § 207(j).[1]

Prior to 1989 or 1990, PVHMC scheduled its nurses to work almost exclusively in 8-hour shifts. However, many PVHMC nurses preferred working 12-hour shifts in order to have more days away from the hospital. The nurses, therefore, requested 12-hour shift schedules. In response to these requests, PVHMC developed and implemented an optional 12-hour shift schedule and pay plan in 1989-90. The pay plan provided nurses the option of working a 12-hour shift schedule in exchange for receiving a lower base hourly salary (that at all times exceeded the minimum wage set forth by the FLSA) and time-and-a-half pay for hours worked in excess of eight per day. The plan prohibited PVHMC from requiring nurses to work additional shifts, absent a medical emergency. If

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[1] Section 207(j) offers hospitals and certain other institutions to agree with their employees to calculate weekly overtime over a fourteen-day period; overtime then is paid for work exceeding 8 hours in one day or 80 hours in a fourteen day period [the 8/80 plan].

nurses voluntarily work longer than the 12-hour shift, they are paid double the regular rate. The result: nurses, who volunteered for the 12-hour shift schedule, would make approximately the same amount of money as they made on the 8-hour shift schedule (while working the same number of hours over a 14-day period and performing the same duties). After PVHMC made the 12-hour shift schedule available, many PVHMC nurses (though not all) opted to work 12-hour shifts.

In 1993, Louise Parth worked as a nurse in PVHMC's emergency room ("ER"). The nurses in PVHMC's ER (including Parth) voted to implement 12-hour shifts. Parth favored the 12-hour shift format, because it provided her more flexibility in her personal schedule, enabling her to (1) care for her mother, (2) pursue a second nursing job at other facilities, and (3) pick up additional shifts at PVHMC. After voting to implement 12-hour shifts in the ER, Parth subsequently entered into a voluntary agreement with PVHMC that reduced her base hourly wage rate from $22.83 to $19.57 in exchange for the 12-hour shift schedule. Parth has worked the 12-hour shift schedule without interruption since 1993.

In 2003, the PVHMC nurses voted to unionize. Accordingly, PVHMC and the nurses' certified bargaining representative, Service Employees International Union, Local 121 ("Local 121"), negotiated a collective bargaining agreement ("CBA") over a nine-month period. Parth was a member of Local 121's Bargaining Committee and therefore attended most of the negotiation sessions. The resulting agreement provided that PVHMC would increase all nurse salaries—for 8-hour shift employees

and 12-hour shift employees alike — by 10% during the CBA's first year, followed by a 5% across-the-board increase for the second and third years. The CBA also reaffirmed PVHMC's practice of paying nurses working the 12-hour shift schedule a lower base hourly rate than nurses working 8-hour shifts.

The CBA set the base hourly rate for Parth's position at $34.644 (the "base rate"). When Parth works a weekday night, her hourly rate is $39.84 (the "weeknight base rate"). When she works a weekend night, her hourly rate is $46.929 (the "weekend night base rate"). Anytime Parth works more than 8 hours in a shift or 80 hours in a 14-day work period, she receives 1.5 times her "regular rate" of pay for those hours. If Parth works beyond 12 hours in a shift, she is paid "double-time"—double the "regular rate" of pay. If she works an additional shift beyond her regular schedule, she is paid at the higher rate applicable to eight-hour shift employees. PVHMC calculates the "regular rate" of pay by multiplying the total number of hours Parth works at each of the corresponding base rates (base rate + weeknight base rate + weekend night base rate), adding those numbers together, then dividing the total base rate pay by the total number of base rate hours worked. The "regular rate" of pay is therefore something more than the weeknight base rate of pay and will vary according to the number of hours worked at the various base rates. This method is known as the "weighted average method" of determining the "regular rate." *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 596 (2d Cir. 2007). After PVHMC calculates the "regular rate" of pay, it multiplies that number by 1.5 to arrive at the overtime rate.

In 2004, all Local 121 members employed at PVHMC (and in good standing with the union) voted on the proposed CBA after being advised of its contents and being provided the opportunity to review its provisions. After Local 121 ratified the CBA, Local 121 representatives and PVHMC executed the agreement. Parth was a signatory to the agreement. She also testified during her deposition that she was aware the CBA continued PVHMC's pay rate practices. Parth continued to work the 12-hour shift schedule at PVHMC.

Just two years later, Parth filed a putative class action Complaint against PVHMC. She alleged that PVHMC's use of different base hourly rates violates the FLSA in that it denies unionized employees overtime pay, to which they are statutorily entitled. The district court found that Parth met the requirements for conditional class certification to bring the FLSA claim. PVHMC then filed a motion for summary judgment, asserting that its pay practices comply with the FLSA. The district court found that Parth did not adduce evidence or law sufficient to support her claims and therefore granted PVHMC summary judgment. We affirm.

II. STANDARD OF REVIEW

We review de novo the district court's order granting summary judgment. *See, e.g.*, *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). On review, we must determine, viewing the evidence in the light most favorable to Parth, "whether there are any genuine issues of material fact and whether the district court correctly applied the [relevant] substantive law." *Olsen v. Idaho*

State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. DISCUSSION

Parth argues that PVHMC violated the FLSA by creating a pay plan that pays nurses working 12-hour shifts a lower base hourly rate than nurses who work 8-hour shifts. In support of her argument, Parth contends that: (A) PVHMC cannot reduce the base pay for nurses working the 12-hour shift, (B) the 12-hour base pay rate is an "artifice" designed to avoid the FLSA's overtime and maximum hours requirements, and (C) PVHMC cannot justify the base hourly pay rate differences between the 8-hour and 12-hour shifts, because nurses working both shifts perform the same job duties.

A.

[1] Parth first asserts that PVHMC cannot reduce the base pay for nurses working the 12-hour shift, because such reduction violates the FLSA. The FLSA requires hospitals on the 8/80 plan to pay employees, who work more than 8 hours in a day or 80 hours in a two-week period, one and a half times the employees' "regular rate" of pay. 29 U.S.C. § 207(j). The Supreme Court interprets "regular rate" to mean "the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co, Inc.*, 325 U.S.

419, 424 (1945). Congress's purpose in enacting the FLSA "was to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). *See also Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999). Under the FLSA, employers and employees are generally "free to establish [the] regular [non-overtime] rate at any point and in any manner they see fit," "[a]s long as the minimum hourly rates established by Section 6 [of the FLSA] are respected." *Youngerman-Reynolds*, 325 U.S. at 424. Though our Circuit has never been asked to determine whether an employer subject to the FLSA may alter the "regular rate" of pay in order to provide employees a schedule they desire, we conclude that such an arrangement does not contravene the FLSA's purpose.

[2] Soon after Congress enacted the FLSA, but before it became effective, many employers altered their compensation schemes—by lowering base hourly rates—to ensure that they paid employees the same overall wages after complying with the FLSA's overtime requirements. *See, e.g.*, *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 628-30 (1942). In *Belo*, the Supreme Court examined these compensation practices and held that, even when the employer's purpose in lowering hourly base rates "was to permit as far as possible the payment of the same total weekly wage after the [FLSA] as before. . . . [N]othing in the [FLSA] bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the [FLSA]." *Id.* at 630.

The Eleventh Circuit followed *Belo*'s holding in a case involving a municipal employer. *See Wethington v. City of Montgomery*, 935 F.2d 222 (11th Cir. 1991). "When passed in 1938, the FLSA did not apply to any state or local employers." *Id.* (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985)). Congress expanded the FLSA's definition of "employer" in 1974 to include municipalities. In *Garcia*, the Supreme Court reversed its previously-established precedent and held that state and local governments could be liable for FLSA violations. *Wethington*, 935 F.2d at 224-25. Given the potential for sudden liability, Congress delayed application of the FLSA to municipal employers until April 15, 1986. *Id.* At 225 (citing Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 787, 788). Accordingly, municipal employers such as the City of Montgomery (the "City") became subject to the FLSA as of April 15, 1986.

In *Wethington*, the City endeavored to create and implement a "budget-neutral" plan that would ensure FLSA compliance before April 15, 1986. *Wethington*, 935 F.2d at 225. Prior to *Garcia*, the City paid its fire fighters on a salary basis, which covered "a cycle of three pay periods, each involving varied hours over 14 days: one 104-hour period, one 112-hour period, and one 120-hour period. For this 42-day, 336-hour cycle, a typical fire fighter would receive $2,208.45. The actual working time within these periods consisted of rotations of duty in which the fire fighters worked 24 hours, were off duty for 48 hours, worked another 24 hours, and so on." *Id.* This scheme did not provide for overtime, so in June 1985, the City adopted a new hourly wage scale to comply with the FLSA. *Id.*

The City determined that under the FLSA, 316 of the 336 hours in the 42-day cycle would be considered regular hours, while 20 would be considered overtime. *Id.* In order to create a new, yet "budget-neutral," pay plan that incorporated time-and-a-half overtime pay, the City, "for the purpose of calculation, increased the [20] overtime hours by 50%. [It] then took the fictitious total hours of 346 (316 regular plus 30 adjusted overtime) and divided them into the fire fighters' total pay for that period to produce a per-hour wage of $6.3828." *Id.* The revised system ensured that City fire fighters would work the same hours and shifts as before, but would receive $6.3828 per hour for 316 regular hours, and $9.5742 ($6.3828 multiplied by 1.5 as required by the FLSA) per hour for 20 hours of overtime, totaling $2,208.4488. *Id.* "Therefore the total salary and total hours did not change. The payment system and the equivalent hourly rates of pay, however, did change. Under the prior, salary system, the converted hourly rate amounted to $6.57. Under the revised system, the effective rate was decreased to $6.38." *Id.* The fire fighters sued the City, making an argument similar to Parth's.

Citing *Belo*, the Eleventh Circuit held that, if a new pay plan "actually employed is valid under the [FLSA], the fact that the regular rate adopted prior to the [FLSA's] effective date produces a total pay no greater than the total pay under a prior system is not enough to establish a violation of the FLSA." *Id.* at 229. The court "read the *Belo* language to support the City's argument that it is not a violation of the [FLSA] to reduce, prior to the effective date of the [FLSA], the hourly rate paid employees in order to avoid greater payments upon application of the FLSA." *Id.*

[3] We recognize that the *Belo* and *Wethington* cases dealt with employers creating cost-neutral pay plans that lowered employees' base hourly rates before becoming subject to the FLSA. However, there is no Supreme Court or Ninth Circuit case that says whether an employer can or cannot do so while subject to the FLSA. Courts around the country have dealt with similar matters, with conflicting results. *Compare, e.g., Conner v. Celanese, Ltd.*, 428 F. Supp. 2d 628, 637 (S.D. Tex. 2006) (holding that "an employer can comply with the FLSA by reducing the 'regular' wage paid to its employees and pay overtime at one and one-half times the reduced regular rate such that the total pay to the employees remains the same"), *with Rhodes v. Bedford County, Tenn.*, 734 F. Supp. 289, 292 (E.D. Tenn. 1990) ("The court is of the opinion that defendant's implementation of [a revised pay plan similar to PVHMC's] constitutes a scheme intended to avoid the overtime requirements of § 7. [Even though it] result[ed] in the workers being paid the same amount for the same number of hours worked both before and after the changeover. This was accomplished by artificially altering plaintiffs' 'regular rate.' ").

[4] This case presents us with an issue of first impression. However, we agree with the district court's approach and use Supreme Court precedent on pre-FLSA pay plan alterations for guidance on how to proceed under the facts before us. In *Belo*, 316 U.S. at 630, the Supreme Court stated that "nothing in the [FLSA] bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum rate required by the FLSA." Further, *Youngerman-Reynolds*, 325 U.S. at 424,

states that "[a]s long as the minimum hourly rates established by Section 6 [of the FLSA] are respected, the employer and employee are free to establish this regular rate at any point and in any matter they see fit." The PVHMC pay plan conforms with this precedent.

[5] Additionally, we look to the purpose of the FLSA, which is "to ensure that each [covered] employee . . . would receive '[a] fair day's pay for a fair day's work' and would be protected from the evil of 'overwork' as well as 'underpay.' " *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1150 (9th Cir. 2000) (quoting *Barrentine*, 450 U.S. at 739). The PVHMC 12-hour shift scheduling practice was first initiated at the nurses' request. The 12-hour shift scheduling practice was then memorialized in a collective bargaining agreement as a result of negotiations between Local 121 and PVHMC (again initiated at the nurses' request). The parties do not dispute that the wages paid under the pay plan are more than the minimum wages under federal law. The pay practice ensures that employees who work beyond eight hours in a day receive time-and-a-half for their efforts. In fact, the nurses are paid daily overtime under this lawful 8/80 schedule. Such overtime is properly calculated based on the actual overtime rate paid to them. The agreement also prohibits the hospital from requiring its nurses work additional shifts, absent a medical emergency. Lastly, it ensures that employees who volunteer to work more than twelve hours in a day receive "double-time" pay. We therefore conclude that the pay practice protects employees from the evils of overwork and underpay, and properly incentivizes PVHMC from overworking its nurses.

Parth is correct that PVHMC was under no obligation to reduce the regular hourly rate of nurses who opted for the 12-hour shifts. PVHMC could have maintained the hourly rate paid to those employees when they were working 8-hour shifts prior to the agreement and absorbed the greater wage costs. However, we do not decide whether the agreement was an ideal, or even preferred, method of contracting; we decide only whether the agreement in question was permissible under the FLSA.

[6] Accordingly, we conclude that the arrangement between Parth and PVHMC does not violate the FLSA, because it is not prohibited under the statute, and it does not contravene the FLSA's purpose. Parth cannot cite any relevant case law to support her argument that PVHMC cannot respond to its employees' requests for an alternative work schedule by adopting the sought-after schedule and paying the employees the same wages they received under the less-desirable schedule. To us, PVHMC's actions seem perfectly reasonable, were requested by the nurses (who work the schedules), and are the result of a bargained-for exchange between the hospital administration and Local 121.[2]

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[2] The employee's consent to the reduced regular rate is a factor in determining whether a reduced rate was bona fide. However, an employee may not waive his or her rights under the FLSA, and agree to a pay plan that violates the FLSA. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981).

B.

Parth also argues that the 12-hour shift pay plan is essentially an artifice to avoid paying overtime. The district court examined this argument. It noted that Parth could cite "no authority for the proposition that these facts show the 12-hour rate was a subterfuge that violated the FLSA." We agree.

Parth's argument hinges on two issues: first, whether PVHMC's pay plan contravenes the FLSA's purpose; second, whether the revised "regular rate" is unrealistic and artificial.

[7] Employers cannot lawfully avoid the FLSA's overtime provisions "by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means." 29 C.F.R. § 778.500(a). The FLSA also prohibits employers from adopting "split-day" plans in which the employee's hours are arbitrarily divided in such a way as to avoid overtime payments. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); 29 C.F.R. § 778.501. Both types of plans work in a manner so that employees do not earn overtime compensation, regardless of how many hours they worked.

An employee's "regular rate" of pay is "the hourly rate actually paid the employee for the normal, non-overtime workweek for which [s]he is employed." *Youngerman-Reynolds*, 325 U.S. at 424. *See also United States v. Rosenwasser*, 323 U.S. 360, 363-64 (1945) (holding that "Section 7(a) [of the FLSA] refers to a 'regular rate' which we have defined to mean 'the hourly rate actually paid for the normal, non-overtime

workweek.' " (quoting *Helmerich & Payne, Inc.*, 323 U.S. at 40)). PVHMC's regular rate for 12-hour shift nurses is the rate it pays for the first eight hours of a 12-hour shift. Thereafter, the nurses are paid time and a half pay for the next four hours of their shift and double pay for any work they volunteer to perform after the 12-hour shift.

[8] Parth contends that PVHMC's regular rate for nurses working the 12-hour shift is artificial, and therefore unlawful, relying on *Youngerman-Reynolds* to support her argument. *Youngerman-Reynolds* holds that employers cannot skirt the FLSA's requirements by creating a new payment scheme and corresponding lower regular rate that does not reflect the economic reality of the employees' work. *Youngerman-Reynolds*, 325 U.S. at 425. In *Youngerman-Reynolds*, an employer paid its employees a piece rate determined by the number of boards they ricked and stacked. *Id.* at 420-21. When generating the new hourly rate from which it would base overtime compensation under the FLSA, the employer created an arbitrary per-hour piece rate that did not reflect the actual rate at which its employees stacked and ricked wood. *Id.* at 421-23. The Supreme Court held that the scheme violated Congress's goals in enacting the FLSA—"inducing the employer to reduce the hours of work and to employ more [workers]," and "compensating the employees for the burden of a long workweek." *Id.* at 423-24.

[9] In its amicus briefing, the Department of Labor recommended that courts review agreements (such as this one) to determine whether the rates are artificial by resolving whether the reduced rate was "bona fide." The Department then argued that a reduced rate was bona fide if it was "(1) agreed to by the employee; (2) in

place for a substantial period of time; and (3) equal to or in excess of the Act's minimum wage." Applying these factors, the PVHMC reduced rate was bona fide.[3] First, the reduced rate was agreed to by the employees through the collective bargaining agreement, in which there appears no evidence of improper influence or inequality of bargaining position. The plan provides employees more scheduling flexibility, allows them to spend less time commuting to work (because they spend fewer days at work), and ensures that PVHMC does not retain an incentive to ask the nurses to work longer hours. Second, the rate has been in place since 1989 or 1990 (and applied to Parth since 1993). Third, the rate paid nurses working the 12-hour shift far exceeds the Act's minimum wage.

[10] Parth also asserts that the regular rate is "unrealistic" and "artificial," in violation of the Supreme Court's admonition in *Helmerich & Payne, Inc.*, 323 U.S. at 42, that a regular rate cannot be derived "in a wholly unrealistic and artificial manner." *See also Adams v. Dep't of Juvenile Justice of New York*, 143 F.3d 61, 67-68 (2d Cir. 1998) (stating that the regular rate may not be set in a "wholly unrealistic

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[3] The Department's amicus brief (which was submitted at our request in connection with a petition for rehearing) concluded:

> The Hospital's reduction of the nurses' regular hourly wage rates does not appear to be designed to circumvent the Act's overtime requirements and appears to meet three factors identified by the Department for ensuring that reduced rates are bona fide. Furthermore, the panel's decision does not conflict with a decision of the Supreme Court or a decision of this Court. Therefore, neither panel rehearing nor rehearing en banc is warranted.

and artificial manner" that does not reflect actual practice). The Department of Labor has incorporated *Helmerich & Payne* and *Youngerman-Reynolds* into its regulations, promulgating regulations to guide employers who wish to ensure their regular rates are not deemed artificial or unrealistic. *See* 29 C.F.R. §§ 778.316, 778.500 through 778.503. The regulations set out numerous examples by which employers may not avoid overtime, none of which are violated by this plan. These regulations outline that an employer may not set an artificially low hourly rate upon which to calculate overtime; an employer may not decrease the hourly rate in response to the number of hours worked by an employee during the week; the employer may not set the hourly rate for overtime hours, at a rate lower than the regular rate especially when the overtime work is identical to that performed during regular hours; an employer may not agree with employees that overtime hours worked do not count as hours worked; an employer may not set the hourly rate for regular work lower during the weeks when overtime is worked than it would be set in non-overtime weeks; an employer cannot enter into an agreement not to count hours over 40 in order not to pay for extra hours worked; an employer cannot pay an employee the same amount each week (including both non-overtime hours and overtime hours) without regard to the overtime worked. Parth produced no evidence to show that the regular rates, memorialized in the CBA, fell into any of these categories, or were artificially low, or that PVHMC was attempting to set rates in a manner that would relieve it of the obligation to pay time-and-a-half whenever an employee worked more than eight hours in a day.

Lastly, Parth and the other nurses are paid overtime under the PVHMC plan when due. Their overtime wages are calculated according to the standards set forth in 29 C.F.R. § 778.115 and the CBA, (a regular rate for the first eight hours, time and a half for the next four hours, and double pay for any additional hours for which the nurse volunteers). Parth appears to take issue with the manner by which her "regular pay" is calculated, and basically argues that instead of using the weighted average method of determining the regular rate, PVHMC should be required to use the "average blended rate" of pay. The "average blended rate" is the total pay earned by a nurse in a 12-hour shift, divided by 12. To the extent Parth's argument is that average blended rate calculation is the only permissible "regular rate" of pay under the FLSA, we reject it. The weighted average method of calculation is not prohibited by the FLSA, and has been upheld by other circuits. *See, e.g.*, *Gorman*, 488 F.3d at 596 ("This Court has already validated the weighted average method of determining the regular rate, which we described as 'properly calculated by adding all of the wages payable for the hours worked at the applicable shift rates and dividing by the total number of hours worked.'") (quoting *Brock v. Wilamowsky*, 833 F.2d 11, 14 (2d Cir. 1987)).

[11] The district court noted that "Parth proffer[ed] no argument or support for the proposition that the regular rate for the 12-hour [nurses] was not properly determined, or that overtime pay was not properly calculated using the pay rates set out in the CBA." On appeal, Parth does not challenge the calculation of the overtime rate, except to say that the regular rate upon which it is based is impermissible. Accordingly, we conclude that Parth has not presented any evidence or

convincing authority to suggest that PVHMC's pay plan contravenes Congress's goals in enacting the FLSA or is an artifice to avoid paying overtime.

C.

Parth also argues that PVHMC's pay plan is unlawful, because nurses working both the 8-hour and 12-hour shifts perform the same work, but are paid at different rates. We find no authority that suggests employees cannot be paid different rates for different shifts, and Parth fails to present any authority to the contrary. We do, however, find ample authority from other circuits that supports PVHMC's argument that workers working different shifts may be paid different rates. *See, e.g.*, *Gorman*, 488 F.3d at 595-97; *Conner*, 428 F. Supp. 2d at 636-37; *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1312-13 (11th Cir. 2007). As the Supreme Court has noted, employers and employees are generally free to set the pay rates if minimum wages and overtime payments are paid when due. *See Youngerman-Reynolds*, 325 U.S. at 424.

[12] Parth derives her sole support for this argument from 29 C.F.R. § 778.316, which prohibits employers from setting one hourly rate for the first 40 hours of work and a lower hourly rate for statutory overtime hours. *See* 29 C.F.R. § 778.316. The regulation does not, however, speak to the circumstances present in this case. 29 C.F.R. § 778.316 does not prohibit rate reductions so long as the rate reduction applies generally, to all hours, days, and weeks worked by an employee, without consideration of whether overtime is worked

IV. CONCLUSION

We conclude, as did the district court, that Parth failed to adduce any evidence or authority to support her claim that PVHMC's pay plan violates the FLSA. We conclude that PVHMC was justified in responding to its employees' requests for an alternative work schedule by adopting the sought-after schedule and paying the employees the same wages they received under the less-desirable schedule. There is no evidence to suggest that PVHMC is attempting to avoid paying its employees overtime wages, nor can we find any authority that prohibits PVHMC from paying employees different hourly rates when they are assigned different shifts.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 06-04703 MMM (FFMx)

[Filed December 5, 2007]

LOUISE PARTH, individually and on behalf of all others similarly situated	)
Plaintiff,	)
vs.	)
POMONA VALLEY HOSPITAL MEDICAL CENTER,	)
Defendant.	)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This putative class action involves a labor dispute between plaintiff Louise Parth and her employer, defendant Pomona Valley Hospital Medical Center ("PVHMC"). Parth alleges that PVHMC has adopted a 14-day work period and pay plan that is designed to "eliminate or lessen [PVHMC's] obligation[ ] to pay overtime wages" to employees who work 12-hour shifts ("12-hour shift RNs") rather than 8-hour shifts

("8-hour shift RNs").[1] She asserts three causes of action: an "opt-in" collective claim under the Fair Labor Standards Act ("FLSA"), a declaratory relief claim, and an "opt-out" class claim under California's Unfair Competition Law, California Business & Professions Code § 17200. On July 9, 2007, the court granted Parth permission to facilitate notice pursuant to 29 U.S.C. § 216.

On June 19, 2007, the court issued a minute order setting a briefing schedule on Parth's anticipated motion to certify a UCL class under Rule 23 of the Federal Rules of Civil Procedure. The court directed Parth, in her opening brief in support of the motion, to address the "threshold question" of whether it was proper to certify a Rule 23 "opt-out" class given the provisional certification of two "opt-in" classes under the FLSA. On July 30, 2007, the court found that this issue was not dispositive and did not preclude certification of a proposed UCL class. The court indicated that it would set a schedule for the filing of additional briefs that addressed Rule 23's certification criteria. The parties, however, elected to defer further certification proceedings so that defendant could file a motion for summary judgment. This order addresses that motion.

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[1] First Amended Complaint, ¶ 14.

I. FACTUAL BACKGROUND

A. Evidentiary Issues

Each of the parties has made numerous objections to the evidence proffered by their opponent.[2] Parth objects to PVHMC's use of the declaration of Patricia Titus to outline the history and details of the pay plan at issue on the basis that Titus has not demonstrated she has personal knowledge of the pay plan. See FED.R.CIV.PROC. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Personal knowledge can be inferred from a declarant's position in a company or business. See *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000) ("Personal knowledge may be inferred from a declarant's position," citing *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1330 (9th Cir. 2000)); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (concluding that a CEO's personal knowledge of various corporate activities could be presumed). Titus is PVHMC's Administrative Director of Nursing Administration, a position she has held for the past five years.[3] Even if Titus was not directly involved in setting the hourly

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[2] Because the parties did not note their evidentiary objections in their separate statements of material facts and genuine issues, the court has done its best to cross-reference each item of evidence to determine whether it is disputed or undisputed, and whether it is admissible or inadmissible.

[3] Declaration of Patricia Titus ("Titus Decl."), ¶ 2.

rates of pay for RNs, the position she holds gives rise to an inference that she has detailed personal knowledge of the pay structure and rates and of the history that led to its adoption. See *E.E.O.C. v. Catholic Knights Ins. Soc.*, 915 F.Supp. 25, 27 (N.D. Ill. 1996) ("Sheedy's testimony is admissible because he held a position in which he would be expected to know the amount of control Catholic Knights exhibited over the insurance agents. That Sheedy was fired and that Sheedy did not occupy the position for almost a year before the relevant time are factors that go to the weight of the evidence, not its sufficiency"). Parth's foundation objection is therefore overruled. The court notes, however, that the parties do not dispute that the pay plan was implemented as memorialized in the collective bargaining agreement. Nor do they dispute the mechanics of how it operates in practice. As a result, the history of the pay plan, its purpose, and Titus' recitation of the "details" of the plan are not relevant, and it is not necessary to rule on each objection that Parth asserts to statements in Titus' declaration.

Similarly, the court declines to address each of the many objections PVHMC has asserted to exhibits attached to the declarations of Frank Coughlin and Michael Carras. The gravamen of PVHMC's objections is that evidence of employee contracts that are not governed by the collective bargaining agreement ("CBA") or that do not pertain to members of the putative class is irrelevant under Rules 402 and 403 of the Federal Rules of Evidence. As a general matter, the court agrees that evidence not bearing on Parth's FLSA claim is irrelevant in deciding this motion. As discussed *infra*, however, the challenged exhibits do not raise a true factual dispute. respecting the central

legal question raised by the motion. Accordingly, the court declines to rule on each evidentiary objection individually.

PVHMC also objects to the admission of the supplemental evidence Parth submitted and to consideration of the objections she made on October 23, 2007 – a day after PVHMC filed its reply. Because the supplemental evidence does not alter the court's conclusion that there is no true factual dispute in this case, it need not address whether the evidence is admissible.[4]

B. Undisputed Facts

1. The Parties

PVHMC is a 443-bed acute care, not-for-profit teaching hospital serving eastern Los Angeles and western San Bernardino Counties.[5] Parth is a RN who

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[4] The court directed Parth to file her opposition to the motion on or before October 15, 2007. Parth filed the supplemental evidence on October 23, 2007, in violation of this order, and thus deprived PVHMC of the opportunity to respond to it. This alone would be grounds to exclude it.

[5] Defendant's Separate Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment or in the Alternative Summary Adjudication ("Def.'s Facts"), ¶ 6; Plaintiff's Statement of Genuine Issues in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Issues"), ¶ 6. Plaintiff suggests the fact that PVHMC is a "not-for-profit teaching hospital" is immaterial because the only relevant issue is whether it is an employer subject to the FLSA. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under

has been continuously employed at PVHMC from June 1977 to the present.[6] Since 1978, Parth has been assigned to the Emergency Room Department ("ER"), where she works the night shift.[7] She began working at PVHMC as a full-time employee; since 1991, however, she has been on regular part-time status.[8]

Some RNs at PVHMC work 12-hour shifts, while others work 8-hour shifts.[9] The collective bargaining agreement ("CBA") describes three categories of 12-hour shift RNs.[10] Full- time RNs who work 12-hour shifts are regularly scheduled to work six 12-hour

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the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court will consider only such facts as are material under the substantive law governing decision of this motion. To provide context for the parties' dispute, however, the court includes some facts in this order that do not control resolution of the parties' dispute.

[6] Def.'s Facts, ¶¶ 7-8; Pl.'s Issues, ¶¶ 7-8.

[7] Def.'s Facts, ¶¶ 11-12; Pl.'s Issues, ¶¶ 11-12.

[8] Def.'s Facts, ¶¶ 13-14; Pl.'s Issues, ¶¶ 13-14.

[9] Def.'s Facts, ¶¶ 16, 22; Pl.'s Issues, ¶¶ 16, 22. Parth objects to PVHMC's description of these two categories of nurses as two different "Job Classifications," contending that it was coined for litigation purposes after the initiation of this suit. However characterized, both parties agree that RNs work two lengths of shifts that are assigned a different "base wage" under the collective bargaining agreement.

[10] Def.'s Facts, ¶ 17; Pl.'s Issues, ¶ 17.

shifts over the course of a 14-day work period.[11] Part-time RNs working 12-hour shifts are assigned to work three shifts over the course of 14 days.[12] Per diem RNs are assigned two 12-hour shifts over the course of a 14 day work period.[13] The CBA similarly describes three categories of 8-hour RNs: (1) full-time, (2) regular part-time, and (3) per diem.[14]

2. The Pay Plan

In 1989-90, in response to requests by RNs for 12-hour shifts, PVHMC developed and implemented the pay plan at issue in this action. It provides that 12-hour shift RNs will be paid a lower base hourly rate than 8-hour RNs.[15] Because a full-time 12-hour RN must work a minimum of six shifts over 14-days as opposed to the minimum of ten shifts that a full-time 8-hour RN must work, 12-hour RNs are required to work significantly fewer days per year than 8-hour

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[11] Def.'s Facts, ¶ 18; Pl.'s Issues, ¶ 18.

[12] Def.'s Facts, ¶ 19; Pl.'s Issues, ¶ 19.

[13] Def.'s Facts, ¶ 20; Pl.'s Issues, ¶ 20.

[14] Def.'s Facts, ¶ 23; Pl.'s Issues, ¶ 23. Full time 8-hour RNs work a minimum of 10 shifts over a 14-day work period. (Def.'s Facts, ¶ 24; Pl.'s Issues, ¶ 24.) Regular part-time 8-hour RNs work a minimum of five shifts over 14 days. (Def.'s Facts, ¶ 25; Pl.'s Issues, ¶ 25.) Per diem 8-hour RNs work a minimum of two shifts over 14 days. (Def.'s Facts, ¶ 26; Pl.'s Issues, ¶ 26.)

[15] Def.'s Facts, ¶ 29; Pl.'s Issues, ¶ 29.

RNs.[16] Even after PVHMC began to utilize 12-hour shifts, it continued to employ a small number of 8-hour RNs.[17] If an RN wishes to transfer from a 12-hour position to an 8-hour position, he or she must obtain management approval.[18] In or about October 1993, the ER RNs voted to implement 12-hour shifts; Parth voted with the majority.[19] Following this vote, Parth executed a "12-Hour Shift Agreement" and transferred to the new work schedule. As part of the agreement, Parth's hourly wage was reduced from an 8-hour rate of $22.83 to a 12-hour rate of $19.57.[20] Since that time, Parth has worked 12-hour shifts; she is currently categorized as a Clinical Nurse II, 12-Hour, assigned Job Code 2220.[21]

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[16] See Def.'s Facts, ¶ 30; Pl.'s Issues, ¶30. In its memorandum, PVHMC calculates the total required work days for 12-hour and 8-hour RNs. An 8-hour RN with two weeks of vacation must work a minimum of 250 days (with 115 days off). (Defendant's Memorandum of Points and Authorities in Support if Motion for Summary Judgment ("Def.'s Mem.") at 3.) By contrast, a 12-hour RN with two weeks of vacation must work a minimum of 150 work days (with 215 days off). (*Id.*)

[17] Def.'s Facts, ¶ 31; Pl.'s Issues, ¶ 31.

[18] Def.'s Facts, ¶ 59; Pl.'s Issues, ¶ 59.

[19] Def.'s Facts, ¶ 32; Pl.'s Issues, ¶ 32. Parth testified that she supported 12-hour shifts because they gave her flexibility to care for her mother, pursue second jobs at other hospitals and pick up additional shifts beyond her minimum scheduled shifts. (Def.'s Facts, ¶ 33; Pl.'s Issues, ¶ 33.)

[20] Def.'s Facts, ¶ 34; Pl.'s Issues, ¶ 34.

[21] Def.'s Facts, ¶ 36; Pl.'s Issues, ¶ 36.

In 2002-03, the RNs at PVHMC voted to unionize, with the Service Employees International Union ("SEIU"), Local 121 RN ("Local 121") as their representative.[22] Parth was a member of Local 121's Bargaining Committee and attended many of the approximately 30 face- to-face meetings that the union held with PVHMC's management over a nine-month bargaining period in 2003-04.[23] Both Parth and Benigna Contreras, another RN member of the Bargaining Committee, knew about the pay plan prior to the CBA negotiations.[24] Members of the Bargaining Committee attended CBA negotiations, and offered input regarding proposals being discussed on behalf of the RNs in their respective units.[25] On May 27, 2004, PVHMC and Local 121 reached a tentative agreement that left the 12-hour RN pay plan in effect.[26] On May

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[22] Def.'s Facts, ¶ 37; Pl.'s Issues, ¶ 37. Local 121 was certified by the NLRB as the exclusive bargaining representative for the RNs and was recognized by PVHMC. (Def.'s Facts, ¶ 38; Pl.'s Issues, ¶ 38.)

[23] Def.'s Facts, ¶¶ 39-41; Pl.'s Issues, ¶¶ 39-41.

[24] Def.'s Facts, ¶ 42; Pl.'s Issues, ¶ 42. Members of the Bargaining Committee represented units within the hospital during the CBA negotiations. Parth represented the ER RNs and Contreras represented RNs who worked in the Intensive Care Unit ("ICU"). (Def.'s Facts, ¶ 43; Pl.'s Issues, ¶ 43.)

[25] Def.'s Facts, ¶ 44; Pl.'s Issues, ¶ 44.

[26] Def.'s Facts, ¶¶ 46, 51; Pl.'s Issues, ¶¶ 46, 51. The agreement specified that PVHMC would increase its existing salary ranges across the board by 10% for both 8-hour and 12-hour shift RNs. There was to be 5% across-the-board increase in each of years two and three of the contract. Additionally, an extra step was to be added for positions that had previously had only 7 steps; this

27, 2004, all Local 121 members in good standing voted to approve the CBA.[27] Although the CBA did not include final salary pay scales, voting members of Local 121 were advised of the contents of the CBA, and the agreement was made available to them for review prior to the vote.[28] At some point after PVHMC and Local 121 reached agreement, PVHMC created specific pay scales, implementing the terms of the CBA by applying percentage increases set forth therein to the existing 2002 pay scale; these were attached as an appendix to the CBA.[29] Sometime in June 2004, Parth personally executed the CBA together with other members of the Bargaining Committee; the agreement

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eighth step carried a 5% wage rate increase. (Def.'s Facts, ¶ 46; Pl.'s Issues, ¶ 46.)

[27] Def.'s Facts, ¶ 47; Pl.'s Issues, ¶ 47.

[28] Def.'s Facts, ¶ 47; Pl.'s Issues, ¶ 47. Parth notes, and PVHMC does not dispute, that the actual final pay scales were not produced until after Local 121 voted on the CBA. There does not appear, however, to be any dispute that the CBA as it was approved memorialized the continuation of the pay practices that were in place before the vote. See Pl.'s Issues, ¶ 47, Defendant's Reply to Plaintiff's Opposition to PVHMC's Separate Statement of Facts in Support of PVHMC's Motion for Summary Judgment ("Def.'s Reply Facts"), ¶ 47.

[29] Def.'s Facts, ¶ 48; Pl.'s Issues, ¶ 48. Parth notes that PVHMC proffers no specific evidence as to when the pay scales were created and provided to the union. She asserts that the pay scales were not created or provided to the union until after the parties reached agreement on the CBA. (Pl.'s Issues, ¶ 48.) For purposes of this motion, the court accepts Parth's statement as true. There is no dispute, however, that the pay scales that are attached to the CBA were created by PVHMC.

was backdated to May 28, 2004.[30] When Parth signed the CBA, she knew that the Clinical Nurse II, 12-hour base rate was lower than the Clinical Nurse II, 8-hour base rate.[31] As ratified, the CBA listed the base hourly wage rates for both 12-hour RNs and 8-hour RNs.[32]

3. The Calculation of Wages

During the relevant time period, the base hourly wage rate for 12-hour RNs was more than the minimum wage mandated by the FLSA.[33] Parth is a

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[30] Def.'s Facts, ¶ 49; Pl.'s Issues, ¶ 49.

[31] Def.'s Facts, ¶ 50. Parth's argument that she did not realize she was receiving a lower rate of pay until she saw the actual pay scales is contradicted by her deposition testimony. Parth testified that she knew at the time the CBA was ratified that she and other 12-hour employees would be paid at a reduced rate; when asked whether she was "okay on May, 27 2004 [with] receiving a reduced rate of pay for twelve-hour shifts," she answered "yes." (Declaration of Jason W. Kearnaghan in Support of Defendant's Motion for Summary Judgment ("Kernaghan Decl."), Exh. E (Deposition of Louise Parth ("Parth Depo.")) at 80:20-22.) Parth now asserts that she "did not know that she was getting a lower rate of pay until she saw the pay scales." (Pl.'s Issues, ¶ 50.) She cites her deposition testimony in support of this claim; yet that testimony reflects only that Parth was unaware of the *specific* rates of pay at the time the CBA was approved. (See Parth Depo. at 80:5-7 ("But as far as them having the – what are you making now and having it figured out what you are going to be making down the line, no, we do not have that").) It does not support, and indeed directly contradicts, her present contention that she knew the hourly rates for 12-hour RNs were lower than those for 8-hour RNs.

[32] Def.'s Facts, ¶ 52; Pl.'s Issues, ¶ 52.

[33] Def.'s Facts, ¶ 53; Pl.'s Issues, ¶ 53.

Clinical Nurse II, 12-hour, in step 8 of Job Code 2220. The base hourly wage rate for a nurse in her position is $34.644.[34] Parth is regularly scheduled to work weekday nights. She receives a 15% shift premium for each of night-time shift, making her hourly wage for weekday nights $39.840.[35] Occasionally, Parth works on weekend nights. The hourly rate for weekend nights is $46.929.[36] When Parth works more than 8 hours in a shift or 80 hours in a 14-day work period, she is paid

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[34] Def.'s Facts, ¶ 55; Pl.'s Issues, ¶ 55.

[35] Def.'s Facts, ¶ 55; Pl.'s Issues, ¶ 55. The night shift premium is calculated by multiplying the base hourly wage ($34.64) by .15 (15%), and adding the product ($5.196) to the base wage. Thus, the night shift premium is $39.84. PVHMC appears to have made a typographical error in describing the formula for the night shift premium in its statement of facts. (See Def.'s Facts, ¶ 55 ("her base rate of pay for a weekday night shift is calculated as follows: ($26.64 x 15%) + $36.44 = $39.84").) The calculation is correctly stated in PVHMC's memorandum. (See Def.'s Mem. at 15 n. 8 ("her base rate of pay for a night shift is calculated as follows: ($34.644 x 15%) + $34.644 = $39.84).)

[36] See Declaration of Stacy Willey in Support of Motion for Summary Judgment ("Willey Decl."), Exh. D. PVHMC cites Exhibit D to the Willey Declaration in its memorandum, but not cite in its statement of facts. PVHMC does not provide any information as to how this weekend evening premium is calculated. Nevertheless, Parth does not dispute that Exhibit D accurately reflects the amount of wages earned for the week ending on May 12, 2007. (See Pl.'s Issues, ¶¶ 55-58.) Exhibit D reflects the rates paid for each type of work. As there is no dispute regarding the authenticity of Exhibit D, or the information contained on it, the court concludes that the parties agree regarding the hourly wage rates and premiums paid by PVHMC.

1.5 times her base rate of pay for those hours.[37] When an employee works beyond her normal 12-hour shift, she is paid "double time."[38]

For the pay period ending May 12, 2007, Parth earned total gross wages of $1,942.37 for 36.79 hours of work.[39] Of these 36.79 hours, 4 were weekday

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[37] Def.'s Facts, ¶ 21; Pl.'s Issues, ¶ 21. Parth argues that there is more than one "base rate" to which time and a half is applied. Specifically, she asserts that there are two base rates and that PVHMC pays overtime on a "weighted average" methodology. (Pl.'s Issues, ¶ 21.) The court addresses this dispute *infra*. It is sufficient to note presently that the parties agree that a 1.5 multiplier is applied when the hours in any shift exceed 8, or whether more than 80 hours are worked in a 14-day work period. (See *id.*)

[38] See Def.'s Facts, ¶ 26. Although Parth disputes that PVHMC has correctly identified the "regular rate" paid for a 12-hour shift, she does not dispute that PVHMC pays double time when an RN works more than 12 hours in a shift. (See Pl.'s Facts, ¶ 26.)

[39] Def.'s Facts, ¶ 56; Pl.'s Issues, ¶ 56. The pay record, broken down by job code and hours worked, reflects:

Type of Shift	Hours	Rate	Total Pay
Weekday Eve.	8.0	$39.840	$318.72
Weekday Eve. 12-hour overtime	4.0	$62.125	$248.50
Weekday Eve. Double Time	.24	$84.417	$20.26
Weekend Eve.	16.0	$46.929	$750.86
Weekend Eve. 12-hour overtime	8.0	$69.214	$553.71

overtime hours.[40] PVHMC calculated Parth's "regular rate" by multiplying the total number of hours worked by the base rate (for weekday and weekend shifts respectively), and dividing the total pay amount by the total hours worked.[41]

Weekend Eve. Double Time	.55	$91.491	$50.32
TOTAL	36.79		$1,942.37

See Willey Decl., Exh. D; Def.'s Mem. at 13.

[40] Def.'s Facts, ¶ 56; Pl.'s Issues, ¶ 56. Although not explicitly noted by defendant, it appears that Parth also worked 8 hours of weekend overtime. (Willey Decl., Exh. D.)

[41] See Def.'s Mem. at 15. PVHMC calculates the amount as follows:

Step One: Total Compensation	
Weekday	12.24 (Hours) x $39.840 (Weekday Base Rate)= $487.642
Weekend	24.55 (Hours) x $46.929 (Weekend Rate) = $1152.107
Total Compensation (without overtime)	$487.642 + $1152.107 = $1,639.75
Step Two: Calculate Regular Rate	
$1,639.74 (Total Compensation) ÷ 36.79 (Hours) = $44.571 (Regular Rate of Pay)	
Step Three: Calculate Overtime	
Overtime Premium Rate	$44.517 (Reg. Rate) x 0.5=$22.29 (Overtime Premium Rate)
Overtime Premium Pay	$22.29 (Overtime Premium Rate) x 4.0 (hours) = $89.14 (Overtime Pay)

RNs working 12-hour shifts receive pay under two rates: the Job 1 rate and the Job 2 rate.[42] The Job 1 rate is the base rate of pay for minimum commitment shifts worked, while the Job 2 rate is a higher rate of pay for shifts worked beyond the minimum.[43] The Job

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Base Pay for Weekday Overtime Hours	$39.84 (base rate) x 4.0 (hours) = $159.36 (Total Base Pay for Weekday Overtime Hours)
Total Weekday Overtime Hours	$89.14 (Overtime Pay) + $159.36 (Base Pay) = $248.50 (Total Weekday Overtime Compensation)

See Def.'s Mem at 15. As can be seen, PVHMC combines weekday and weekend hours, and does not consider any hours overtime, in determining the "regular rate. The resulting number is $248.50 for the four hours of weekday overtime which is paid at a rate of $62.125 an hour. Parth acknowledges that PVHMC used this formula in calculating her pay, but disputes that use of a "Regular Rate" of $44.571 is legal. (Pl.'s Issues, ¶ 57.)

[42] Def.'s Facts, ¶¶ 61-62; Pl.'s Issues, ¶¶ 61-62. Parth disputes what triggers use of the different Job Rates, but does not dispute that PVHMC uses them in calculating RNs' pay. (See Pl.'s Issues, ¶¶ 61-62 (arguing that 12-hour RNs receive the Job 2 rate for meetings and that the Job 2 rate is not an incentive to work more, but rather a remedial measure to make up for lost wages).) PVHMC, by contrast, asserts that the two Job Rates do not represent different hourly base pay rates. Rather, it argues that the Job 2 rate is an incentive rate for hours worked beyond the minimum commitment. (Def.'s Reply Facts, ¶¶ 61-62.)

[43] Def.'s Facts, ¶¶ 61-62; Pl.'s Issues, ¶¶ 61-62. PVHMC argues that the Job 2 rate is an incentive to encourage RNs to work extra hours beyond their minimum shifts. (Def.'s Facts, ¶ 62.) As evidence of this, it proffers the testimony of several RNs and supervisors who describe the Job 2 rate as an incentive. (*Id.*) Citing her own testimony, Parth counters that the Job 2 Rate is

2 rate is equal to the base rate paid to 8-hour shift RNs.[44]

C. Disputed Facts

Although the parties dispute many incidental details of the pay plan, the material facts bearing on the legal question presented by this motion are undisputed. Parth contends that the 12-hour rate is an artifice designed to ensure that every RN is paid the same amount, and that PVHMC avoids payment of overtime and the FLSA's maximum work hour limits. As support for this, she proffers evidence that, in its recruiting process, PVHMC represents that a 12-hour

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designed to compensate for the loss in wages suffered by 12-hour shift RNs. (See Parth Depo. at 59:23-60:7 ("they made the offer that we could pick up an extra eight hours at the higher rate if we wanted to").) Parth's testimony does not demonstrate that the Job 2 rate was intended to compensate for the lower rate of pay received by 12-hour shift RNs. Rather, her testimony can be interpreted as supporting the notion that the higher rate was intended as an incentive. The mere fact that RNs were given the option of picking up extra shifts at a higher rate of pay does not speak to the motivation behind PVHMC's decision to offer the option. Parth also asserts that 8-hour shift RNs are not offered an equivalent Job 2 rate as an incentive to work extra shifts. The evidence she cites, however, does not support her argument, as it concerns the consequences of changing from a 12-hour shift to an 8-hour shift, and does not address whether 8-hour shift RNs are offered a Job 2 rate or equivalent. (See Plaintiff's Additional Material Facts ("Pl.'s Additional Facts"), ¶ 31 (citing Declaration of Frank J. Coughlin in Opposition to Defendant's Motion for Summary Judgment ("Coughlin Decl."), Exh. 31 (Deposition of Michele Atkins-Young ("Atkins-Young Depo.")) at 112:1-18, 115:16-22, 116:7-13, 117:3-19).

[44] See Atkins-Young Depo. at 25:13-16.

shift RN's rate of pay is his or her "blended rate."[45] Although PVHMC does not dispute that it gives job applicants a sheet calculating their "Average Blended Rate," it contends that the average blended rate is merely a mathematical calculation provided so that applicants can compare their take-home pay with that they would receive from competitors who pay 12 hours of straight time.[46] It is undisputed that applicants receive a sheet that notes the 12-hour base rate *and* a calculation of the average or blended rate of pay.[47] To

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[45] Pl.'s Additional Facts, ¶¶ 5-6, 8. The parties do not dispute that the "blended rate" is equal to the total salary for a 12-hour shift divided by 12. (Pl.'s Additional Facts, ¶ 9.) For example, if a 12-hour shift RN works a single shift at a base rate of $20 per hour, the RN would be paid $20 per hour for the first eight hours of work. For the final four hours of work, the RN would be paid an overtime rate of 1.5 times the base rate – or $30. As a result, the RN's total pay for 12 hours would be: ($20 x 8) + ($30 x 4) = $160 + $120 = $280. The "blended rate" for such an RN would be $280 ÷ 12 hours or $23.33. (See Coughlin Decl., Exh. 51 (showing a copy of the worksheet distributed to applicants calculating their "blended rate").) It is this higher "blended rate" that Parth contends PVHMC presents as the "regular rate." (Pl.'s Additional Facts, ¶ 5 ("PVHMC communicates orally and in writing to RNs a higher rate of pay than it uses to calculate overtime")

[46] Defendant's Response to Plaintiff's Additional Material Facts ("Def.'s Response Issues"), ¶¶ 5-6, 8. PVHMC does not dispute that applicants are advised of the blended rate, but asserts that they are advised orally and in writing of the base hourly rate as well. (Def.'s Response Issues, ¶ 5.)

[47] Pl.'s Additional Facts, ¶¶ 15-16; Def.'s Response Issues, ¶¶ 15-16. The worksheet Parth cites clearly states the "base rate" and uses it to calculate the "blended rate." (See Coughlin Decl., Exh. 51.) Offer letters sent to 12-hour shift RN applicants also reference both the base rate and the "blended" rate. (See *id.*, Exh. 46.)

the extent there is a disagreement, it concerns RNs' *understanding* of the base and "blended" rates, and whether that understanding impacts determination of the "regular rate" under the FLSA.[48]

Parth also asserts that 12-hour RNs receive paid time off (PTO) at the Job 2 Rate.[49] The language of the

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[48] Parth contends that the "actual rate purportedly paid to 12-hour RNs is a fiction." (Pl.'s Additional Facts, ¶ 10 (citing Coughlin Decl., Exh. 30 (Deposition of Louise Broomfield ("Broomfield Depo.")) at 21:18-22:2 ("Ultimately, their salaries equaled out for the amount of hours worked. . . . So in essence they did not make two different rates of pay. They made the same amount for hours worked").) She asserts that "RNs generally explain their earnings not by the 12-hour reduced rate," but rather with reference to the blended rate. (See Pl.'s Additional Facts, ¶ 11.) Parth speculates that "to recruit, PVHMC must convey the 'blended rate' in the hiring process," and that "RN applicants use the 'blended rate' to make decisions about working for PVHMC." (Pl.'s Additional Facts, ¶¶ 12-13.) Neither conclusion is supported by the testimony cited. The fact that PVHMC uses the "blended rate" in hiring does not mean that it is *necessary* that that rate be used. (Def.'s Response Issues, ¶ 12 ("The blended rate is provided for informational purposes"); Atkins-Young Depo. at 73:10-74:25 (describing the reasons for providing "blended rate" information, and denominating it useful rather than necessary).) Further, as PVHMC correctly notes, the evidence does not show that payment of the "blended rate" is a deciding factor in RNs' decision to work at PVHMC; to the extent Parth asserts this as a fact, it is mere speculation. (See Atkins-Young Depo. at 31:8-15 (noting that PVHMC uses the blended rate to "compare with other institutions").)

[49] Pl.'s Additional Facts, ¶ 34. The CBA states that "[a] nurse's PTO for any workweek shall not exceed the nurse's regularly scheduled number of hours worked in a workweek. Payment is made at the current base rate of pay, including applicable shift differential." (Coughlin Decl., Exh. 1 at 45.) It further provides

CBA requires that employees be paid for PTO at the "current rate of pay." Looking at these facts in combination, Parth infers that the Job 2 rate is the "current rate of pay" for 12-hour shift Rns, and thus their "regular rate" as well.[50] PVHMC does not dispute that the CBA requires payment of PTO at the "current rate of pay." Nor does it dispute that it pays PTO at the Job 2 Rate. It contends, however, that PTO has been paid at the Job 2 Rate since the 12-hour shift plan was adopted in the early 1990s, and asserts that the practice was incorporated without change in the CBA.[51] Stated differently, PVHMC contends that the CBA incorporated the existing PTO pay practice,[52] and thus that "the term 'current base rate of pay' can only be interpreted to mean the rate at which PTO was paid prior to the CBA – the 'Job 2 Rate.'"[53] For these

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that, when an RN transfers or otherwise cashes out her PTO, "such hours will be cashed out at the nurse's regular hourly rate (including shift differential) that was effective on the date of transfer." (*Id.* at 46.)

[50] See Pl.'s Opp. at 7.

[51] Def.'s Reply at 12.

[52] *Id.* at 12.

[53] *Id.* Parth did not attempt to counter this argument in her papers or at oral argument. Rather, she argued that the fact PTO is paid at the higher rate shows that the different wage rates paid to 8- and 12-hour RNs are illusory. Specifically, she asserted that "by paying PTO at the higher rate, PVHMC both acknowledges that the higher rate is the actual rate of pay and attempts to meet employee expectations by paying PTO and other benefits at the higher rate of pay." (Pl.'s Opp. at 7.) This argument overlooks the fact that PVHMC explicitly told 12-hour RNs that they would be paid at a lower rate, and memorialized this in the CBA.

reasons, PVHMC argues that "current rate of pay" and "regular rate" are distinct terms as used in the CBA.

Parth next contends that 12-hour RNs are paid the 8-hour rate for *all* meetings and other "nonproductive" work.[54] This misinterprets the evidence. PVHMC pays 12-hour shift RNs the higher 8-hour rate only for shifts worked *beyond* the minimum shift requirement.[55] The same is true with respect to orientation time. Parth contends that some of PVHMC's recent 12-hour shift employment contracts pay orientation time at the higher Job 2 rate, but provides only an undated, unsigned agreement as evidence of this.[56] PVHMC counters that Parth has acknowledged it does not pay

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[54] Pl.'s Additional Facts, ¶ 33. Parth denominates jury duty "non-productive work." PVHMC notes that, under applicable regulations, jury duty is not considered compensable time for purposes of calculating overtime. Department of Labor regulations state that payments made for vacation and sick time are not "compensation" and are not included when calculating overtime. See 29 C.F.R. § 778.218(a). Time spent on jury duty is not included in this carve-out. See *id.*, § 778.218(d). Whether or not jury time and PTO are taken into account when calculating overtime is not directly relevant to Parth's argument that paying employees for these activities at the Job 2 Rate shows that it is the "regular rate."

[55] See Coughlin Decl., Exh. 37 (Deposition of Stacey Willey ("Willey Depo.") at 14:13-15 ("Meetings that are over and above [the] regularly scheduled six shifts [for full time RNs are] paid at the Job 2 [rate]. If it's part of their six shifts, then it's paid at their Job 1 [rate]")).

[56] Pl.'s Additional Facts, ¶ 23; Coughlin Decl., Exh. 52. Because it is not executed, the contract is not cognizable evidence. Its terms, moreover, are contrary to the CBA that indisputably applies in this case and states that orientation is paid at the base wage rate.

for orientation at the Job 2 rate, but rather at the base hourly wage set out in the CBA.[57]

Finally, Parth notes that some RNs have contracted to work 3 12-hour shifts a week under an "Alternative Work Schedule" ("AWS").[58] The 12-hour RNs who have

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[57] See Pl.'s Additional Facts, ¶ 24. As Parth admits, the Union has filed a grievance asserting that orientation time should be paid at the higher rate. (See Pl.'s Opp. at 5.) The fact that a grievance has been filed shows there is no dispute that PVHMC pays 12-hour shift Rns the 12-hour base rate for orientation time. Indeed, Parth concedes as much in her statement of genuine issues, asserting that 12hour shift RNs "*should* be paid for 8-hour orientation." (Pl.'s Issues, ¶ 61.)

[58] Neither Parth nor PVHMC has adequately explained the AWS program. At oral argument, PVHMC's counsel repeatedly referred to AWS nurses, and noted that he was aware of no alternative work schedule ballot. Under California law, a hospital is permitted to adopt an AWS when 2/3 of the affected employees vote by secret ballot to adopt a schedule of 3 12-hour shifts in a 40 hour work week. See 8 CAL. ADMIN. CODE. § 11050(3)(B)(8) (employees may select a week consisting of "work days exceeding ten (10) hours but not more than 12 hours within a 40 hour workweek"); see also *Singh v. Superior Court*, 140 Cal.App.4th 387, 394 (2006) (noting that the regulations were amended in 1986 to allow 3 12-hour shifts over a week). The regulations permit use of such an alternative schedule if (a) an employee who works more than 12 hours in a given day is paid double-time for the excess hours; (b) an employee who works in excess of 40 hours in a given week is paid time and a half for the excess hours; (c) no shifts call for less than 4 hours of work; (d) the same overtime standards apply to temporary employees assigned to a work unit with an AWS; and (e) the employer makes a reasonable effort to find another work assignment for an employee who cannot work the AWS. See 8 CAL. ADMIN. CODE. § 11050(3)(B)(8)(a-e). With certain exceptions discussed *infra*, the FLSA (and its implementing regulations) do not place any limit on daily work hours so long as employees receive overtime for hours worked in excess of 40 per

been hired to work 3 12-hour shifts per 40-hour week under an AWS are paid at the higher 8-hour wage rate.[59] PVHMC concedes this, but asserts, without dispute by Parth, that AWS workers are not subject to the CBA and are not part of the bargaining unit.[60]

Ultimately, Parth contends that the pay differentials for 12- and 8-hour shift RNs are a "fiction" because, viewed holistically, the salaries equal out for the amount of hours worked.[61] It is undisputed that

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week. Because the FLSA does not include a maximum daily hours requirement, the AWS scheme under which RNs work three 12-hour shifts in a given week without receiving overtime does not conflict with the federal regime.

[59] Pl.'s Additional Facts, ¶ 69; Def.'s Response Issues, ¶ 69.

[60] Def.'s Response Issues, ¶ 69. Parth's counsel repeatedly asserted at the hearing that RNs sought a "straight time" or AWS schedule at the time the CBA was negotiated, and that PVHMC refused to implement such a plan. Parth's own testimony belies this assertion; she testified that at the time the RNs decided to approve the new CBA, a majority *opposed* going to an AWS or "straight twelves" schedule because it would inhibit their ability to pick up additional shifts. See Parth. Depo at 80:24-81:5 ("there were many people in the negotiating that didn't want to go on the straight twelves because they'd like to pick up extra shifts"); *id.* at 82:8-11 (explaining the RNs' vote to accepted a reduced wage in lieu of straight time, Parth stated: "[T]he nurses did not want to go on the straight time because of the factor that they could pick up much more hours than they could working the straight time").

[61] Pl.'s Additional Facts, ¶ 10; Def's Response Issues, ¶ 10. PVHMC does not dispute the conclusion that the salaries evened out across the hours, but it does dispute the conclusion that this renders the difference between the rates a "fiction." The parties do not disagree that the base hourly wages *are* different as laid out in the CBA. (Def.'s Response Issues, ¶ 10.) The claim that the

12- and 8-hour shift RNs receive the same salary for the hours worked. Parth's characterization of the differential as a fiction, however, is merely a restatement of her legal conclusion that the 8-hour shift base rate should be considered the "regular rate" for FLSA purposes. This is the issue to which the court now turns.

II. DISCUSSION

A. Standard Governing Motions for Summary Judgment

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.PROC. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the

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difference is a fiction is merely another way of stating the legal conclusion that the "regular rate" should be considered the 8-hour rate.

movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); FED.R.CIV.PROC. 56(e).

Evidence presented at the summary judgment stage must be admissible. FED.R.CIV.PROC. 56(e). In reviewing the record, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Conclusory, speculative testimony in affidavits and moving papers, however, is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

B. The Overtime Provisions of the Fair Labor Standards Act

The Supreme Court has observed that

> "[t]he principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and

> general well-being of workers.'" *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)).

See also *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1150 (9th Cir. 2000) ("the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from the evil of 'overwork' as well as 'underpay,'" citing *Barrentine*, 450 U.S. at 739); *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (same).

The FLSA requires that, unless exempt, any employee who works more than 40 hours in a work week must be paid one and one-half times his or her "regular rate" of pay. See 29 U.S.C. § 207(a)(1). The FLSA defines "regular rate" broadly as "all remuneration for employment." 29 U.S.C. § 207(e). Courts have defined "regular rate" more specifically as "the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945); see also 29 C.F.R. § 778.108 (same).

As a general rule, "as long as the minimum wage is respected and the agreed upon rate is not a sham, 'the employer and the employee are free to establish this regular rate at any point and in any manner they see fit.'" *Adams v. Dept. of Juvenile Justice of City of N.Y.*, 143 F.3d 61, 67 (2d Cir. 1998) (quoting *Youngerman-Reynolds*, 325 U.S. at 424). While the FLSA contemplates that the regular rate will be set through wage negotiations, "the regular rate will not be

recognized when it is set in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Id.* at 67-68 (citing *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944)); see also *Youngerman-Reynolds*, 325 U.S. at 424 (stating that the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact"). The "regular rate" is an objective fact that must be drawn from what happens under the employment contract rather than the declarations of the parties. See 29 C.F.R. § 778.108; see also *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948) ("Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts," citing *Youngerman-Reynolds*, 325 U.S. at 424-25).

The Department of Labor regulations provide guidelines for calculating the "regular rate" from the wages paid.[62] "The regular hourly rate of pay of an employee is determined by dividing his total

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[62] As administrative interpretations of the statutory term "regular rate," the regulations are not directly binding on the courts. They do, however, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944); see also *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 8 (1st Cir. 1997) ("interpretive regulations are not conclusive, as they merely set forth the Secretary's official position on how the regulations should be applied in specific contexts"); *Takacs v. A.G. Edwards and Sons, Inc.*, 444 F.Supp.2d 1100, 1115 (S.D. Cal. 2006) (citing *Skidmore* and deferring to Department of Labor regulations); *Copas v. East Bay Municipal Utility Dist.*, 61 F.Supp.2d 1017, 1020 (N.D.Cal. 1999) (same).

remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. " If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his 'regular rate.' For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week." *Id.*, § 778.110. When an employee works at two different established rates during a given week, the "regular rate" is the weighted average of the two rates. *Id.*, § 778.115.

There is an exception to maximum hour/overtime rule in § 207(a)(1) for "[e]mployment in [a] hospital or establishment engaged in [the] care of [the] sick[,] aged or mentally ill." 29 U.S.C. § 207(j). If the employer and employee agree before the work is performed,

> "a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed." *Id.*

As can be seen, a hospital that agrees with its employees to utilize a 14-day work period is obligated under the FLSA to pay overtime on all hours worked in excess of eight per day. See *id.*; *Dunlop v. State of*

N.J., 522 F.2d 504, 512 n.16 (3d Cir.) (noting the flexibility conferred by a § 207(j) agreement, but noting the limitation that overtime must be paid unless there are "no more than eight hours of work per day"), vacated and remanded for further consideration on other grounds by 427 U.S. 909 (1976); see also David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, BERKELEY J. EMP. & LAB. 74, 84 n. 49 (1999) ("The FLSA permits hospital and nursing home employees to be paid overtime for hours in excess of 80 over a 14-day period. However, in order to do so, the employee must agree to the arrangement and is entitled to overtime pay for all hours in excess of eight in a day").[63] The provisions of § 207(j) do not apply unless there is a valid agreement between the employer and employee. See 29 U.S.C. § 207(j) (the

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[63] The FLSA does not require, as a general matter, that employers pay overtime for more than eight hours of work in a day. See *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1420 n. 15 (9th Cir. 1990) ("The most important differences between California's overtime pay provisions and the FLSA are as follows: under California law, overtime at one and one-half times an employee's regular rate must be paid after eight hours work per day, 8 CAL. CODE REGS. § 11040.3(A)(1), while under the FLSA, overtime must be paid after 40 hours work per week, 29 U.S.C. § 207(a); 29 C.F.R. § 778.101; under California law, all hours in excess of 12 per day must be paid at double time, 8 CAL. CODE REGS. § 11040.3(A)(2), while the FLSA contains no such provision"); see also *Fernandez v. Centerplate/NBSE*, 441 F.3d 1006, 1008 (D.C. Cir. 2006) ("The Act does not provide, however, for payment of overtime compensation for work exceeding eight hours per day"); *Aamold v. United States*, 39 Fed. Cl. 735, 739 n. 3 (Fed. Cl. 1997) (noting that the FLSA requires overtime for a workweek longer that forty hours and that another statute, the Federal Employees Pay Act, requires that federal employees be paid overtime for work in excess of 8 hours per day).

choice of the 14-day work period must be "pursuant to an agreement or understanding arrived at between the employer and the employee"); see also *Belbis v. County of Cook*, No. 01C 6119, 2002 WL 31600048, *2 (N.D. Ill. Nov. 18, 2002) (noting that a CBA "may include provisions that demonstrate that Section 207(j) is applicable").[64]

C. Whether The Pay Plan Violates the FLSA

PVHMC contends it is entitled to summary judgment on Parth's claims because the 12-hour shift pay plan does not violate the FLSA. Parth's assertion that the plan violates the FLSA is based primarily on her argument that the "regular rate" of pay for purposes of calculating overtime under the FLSA is the higher base rate for 8-hour RNs. Specifically, she contends that (1) it was illegal for PVHMC to reduce the base pay rate for 12-hour shift workers; (2) that the 12-hour rate is an artifice designed to avoid the FLSA's overtime and maximum hour requirements; and (3) that the difference between the 8-hour and the 12-hour base rates cannot be justified because,

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[64] Other exceptions to the general requirements of § 207(a)(1) are likewise triggered by "agreements" between employers and employees. 29 C.F.R. § 785.23, for example, excepts from the maximum work time requirements employees who reside on their employer's premises, and addresses the difficult problem of calculating the exact hours worked by providing that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." See *id.* The Ninth Circuit has held that a CBA that is legitimately negotiated by a union with an employer constitutes "an agreement" for purposes of this regulation, even if the individual employee did not participate himself or herself in the negotiations. See *Leever v. Carson City*, 360 F.3d 1014, 1018 (9th Cir. 2004).

regardless of the length of their shift, RNs perform the same type of work.

1. Whether It Is Permissible to Set a Lower Base Rate for 12-Hour RNs

Parth's most vigorous challenge to the pay plan is her argument that the plan was designed to give the appearance of paying overtime while ensuring that the switch to 12-hour shifts was cost-neutral. Employers have been permitted to alter their compensation system *prior* to the effective date of the FLSA to ensure that the overall wages they paid before and after passage of the Act would remain constant. See *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 630 (1942) ("nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act"). In *Belo*, a newspaper publisher contracted with its employees to set rates of pay that, when the FLSA's overtime and maximum hour requirements took effect, would be roughly equivalent to the wages paid before enactment of the statute. See *id.*[65] Recently, the Eleventh Circuit reaffirmed *Belo*'s basic holding,

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[65] A number of courts have followed *Belo*. See, e.g., *General Mills v. Williams*, 132 F.2d 367, 369 (6th Cir. 1942) (applying *Belo* to an analogous situation in which employees and their employer signed a contract for reduced hourly rates aimed at maintaining the employees' pre-FLSA cumulative wages); *White v. Witwer Grocer Co.*, 132 F.2d 108, 110 (8th Cir. 1942) (upholding a similar pre-FLSA reduction and reasoning that "[c]ontracts between employer and employee as to wages are not made illegal except as the minimum wage or the maximum hours provision are violated").

concluding that it was proper for the City of Montgomery, Alabama to reduce the hourly rates paid to firefighters prior to extension of the FLSA to municipalities, in order to keep the overall rate of pay constant.[66] See *Wethington v. City of Montgomery*, 935 F.2d 222, 230 (11th Cir. 1991) ("[T]he general principle that it is legitimate for employers to lower a pay rate prior to application of the FLSA has not been altered since *Belo*. We therefore conclude that the City's reduction of the hourly rate in June 1985 did not violate the FLSA amendments which did not take effect until April 1986"); see also *Adams*, 143 F.3d at 67 ("As a general rule, nothing in the FLSA prevents an employer from contracting with its employees to pay them the same total wages received prior to FLSA applicability, so long as the regular rate equals or exceeds the minimum wage"). In all of these cases, the lowering of base pay rates to retain cost neutrality was found to be legal because the rates were changed *before* the FLSA took effect.

PVHMC does not dispute that it was subject to the FLSA in 1990 when it implemented the new 12-hour RN pay plan. Rather, it contends that the court should extend the logic of *Belo* and *Wethington* to a situation in which an employer creates a new shift schedule to accommodate its employees and seeks to retain cost

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[66] Prior to 1986, *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the FLSA did not apply to municipalities. Only after the Supreme Court made municipalities subject to the requirements of the FLSA in 1985 did cities have to comply with the maximum hour and overtime requirements of the statute. See generally *Garcia v. San Antonio Met. Trans. Auth.*, 469 U.S. 528 (1985). Congress subsequently delayed the application of the FLSA to state until April 1986. See *Wethington*, 935 F.2d at 225.

neutrality under the FLSA.[67] A district court in the Southern District of Texas recently addressed this issue, and concluded that a rate reduction for 12-hour shifts was permissible under the FLSA. See *Conner v. Celanese, Ltd.*, 428 F.Supp.2d 628 (S.D. Tex. 2006).

In *Conner*, defendant, at the request of its hourly workers, experimented with placing some workers on 12- rather than 8-hour shifts. See *id.* at 631. After a period of experimental implementation, employees were given the opportunity to vote on whether or not to institute the 12-hour shift plan officially. See *id.* at 632.[68] They were informed that hourly rates for 12-hour shifts would be adjusted to ensure that the change would remain cost-neutral. See *id.*[69] The employees, including plaintiff, ultimately voted in favor of 12-hour shifts, although some employees continued to work an 8-hour shift. See *id.* The *Conner* court held that "an employer can comply with the FLSA by reducing the 'regular' wage paid to its

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[67] See Def.'s Mem. at 7-11.

[68] Prior to the vote, the employees were given a packet outlining the specifics of the proposed 12-hour pay plan. *Conner*, 428 F.Supp.2d at 632.

[69] Specifically, defendant advised employees who would be working 12-hour shifts that they would be paid a lower rate than the 8-hour rate. To calculate the new, lower rate, defendant multiplied the 8-hour rate by .857, ensuring that an employee who worked 12-hours would be paid the same overall weekly rate as an employee working 8-hour shifts at the 8-hour rate. See *id.* This is precisely what occurred when PVHMC implemented a 12-hour shift plan. PVHMC used the exactly the same multiplier when it reduced Parth's 8-hour rate of $22.83 to a 12-hour rate of $19.57 – $22.83 x .857 = $19.57.

employees and pay overtime at one and one-half times the reduced regular rate such that the total pay to the employees remains the same." *Id.* at 637 (citing *Belo*, 316 U.S. at 624). Although implicitly addressing the issue, the court did not expressly analyze whether it was appropriate to reduce the "regular rate" of employees whose wages were already subject to the FLSA.

Conner is apparently the only case applying *Belo* to a situation like that presented here. Supreme Court case law, however, supports *Conner*'s holding. In *Youngerman-Reynolds*, the Supreme Court held that "[a]s long as the minimum hourly rates established by § 6 are respected, the employer and employee are free to establish this regular rate *at any point and in any matter they see fit*." *Youngerman-Reynolds*, 325 U.S. at 424 (emphasis added). Other courts have echoed the general principle that employers and employees are free to establish any rate at any time so long as it is not below the minimum wage. See *Allen v. Board of Pub. Ed. for Bibb County*, 495 F.3d 1306, 1312 (11th Cir. 2007) (citing *Youngerman-Reynolds* and holding that "[a]ccordingly, § 7(g) does not require that different types of work be performed in order for employers to lawfully pay different rates"); *Adams*, 143 F.3d at 67 ("In fact, as long as the minimum wage is respected and the agreed-upon rate is not a sham, 'the employer and employee are free to establish this regular rate at any point and in any manner they see fit'"). These cases demonstrate that, regardless of the timing of the reduction, there is nothing *inherently*

improper about an employer and employee agreeing to an hourly rate lower than that previously paid.[70]

The parties do not dispute that the wages paid 12-hour RNs under the pay plan satisfy the minimum wage requirement of § 206. Consequently, the court reaches the same conclusion as did the court in *Conner*. The mere fact that PVHMC and the RNs agreed, after the effective date of the FLSA, to a 12-hour shift base pay rate that was lower than the 8-hour shift rate the RNs had previously received does not make out a statutory violation.

2. Whether the 12-Hour Shift Rate Is an Artifice Designed to Avoid the Statutory Purposes of the FLSA

a. The "Regular Rate"

As noted, "a regular rate will not be recognized when it is set in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Adams*, 143 F.3d at 67-68; see also *id.* (rate may not be calculated in a "wholly unrealistic and artificial manner that does not reflect actual practice"). The

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[70] The court finds further support for this conclusion in the fact that PVHMC did not seek to reduce the hourly rate of pay that existed prior to implementation of the FLSA. The 8-hour rate complied with the FLSA. Thus, the reduction that PVHMC implemented to accommodate 12-hour shifts sought to preserve a status quo that was itself legal. As a result, PVHMC's actions are more fully in accord with the statute's purpose than those of the employer in *Belo*, which sought to preserve a lower pre-FLSA wage rate after the effective date of the Act. See *Belo*, 316 U.S. at 627.

DOL regulations provide examples of situations in which the mechanism for setting a regular rate should be deemed to be artificial and in violation of the Act. See 29 C.F.R. § 778.500(a) ("the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means"). Thus, an employer may not pay a low hourly rate, and supplement an employee's wages with bonuses or commissions to avoid overtime payments. Where such a scheme is crafted, the "regular rate is not the hourly rate but is the rate determined by dividing [the employee's] total compensation from all these sources in any workweek by the number of hours worked in the week." *Id.*, § 778.500(c).[71] In addition, "split-day" plans violate the FLSA.[72] See *id.*, § 778.501. The Supreme Court has

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[71] Section 778.500 also discusses, and finds wanting, the payment of a "varying rate," e.g., a situation in which an employer decreases the base hourly rate of pay as the length of the work week increases to keep weekly pay constant. 29 C.F.R. § 778.500(b) (citing *id.*, §§ 778.321-329). It is also inappropriate for an employer to offer to pay piece rates if the hourly rate, with overtime added, is not equivalent to the piece rate. See *id.*, § 778.500(d) (citing *Youngerman-Reynolds Hardwood Co.*, 325 U.S 427).

[72] Under a "split-day" or "Poxon" plan,

> "the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the "straight time" portion of the day and the other the 'overtime' portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as

held that such plans are purely artificial attempts to circumvent the requirements of the FLSA. See *Helmerich & Payne*, 323 U.S. at 41 (holding that a "split day" plan "provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received").

Parth argues that the 12-hour shift pay plan is essentially a subterfuge by which PVHMC attempts to avoid paying overtime on the "real" regular rate. To demonstrate this, she asserts that PVHMC improperly used the "blended rate" or 8-hour rate to recruit 12-hour RNs.[73] She also cites Louise Broomfield's

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the regular rate: 'time and one-half' based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $5 per hour under a contract which provides for the payment of so-called 'overtime' for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive $20 for the first 4 hours and $30 for the remaining 4 hours; and a total of $50 for 8 hours. (This is exactly what he would receive at the straight time rate of $6.25 per hour.) On the sixth 8-hour day the employee likewise receives $50 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at 'overtime' rates for 20 hours of the workweek." 29 C.F.R. § 778.501(a).

[73] See Pl.'s Opp. at 2-4. Parth alleges that PVHMC disclosed the "blended rate" to applicants to show that their cumulative rate will be higher than their base rate. (Pl.'s Opp. at 2.) She appears to suggest that when recruits are hired, they understand they will be paid the "blended rate." As noted, the facts do not support this conclusion. Although it is true that PVHMC advised applicants of the "blended rate," both in a separate worksheet and in their offer letter, it also disclosed the base rate for 12-hour shifts in both

deposition, in which the former director of emergency services for PVHMC testified, regarding the differential between the 8- and 12-hour RN pay rates, that "in essence [the RNs] did not make two different rates of pay. They made the same amount for hours worked."[74] Finally, Parth notes that 12-hour shift RNs are paid at the 8-hour rate for all meetings and other "non-productive" work.[75]

Parth cites no authority for the proposition that these facts show the 12-hour rate was a subterfuge that violated the FLSA. As PVHMC notes, even if it falsely represented that the 8-hour shift rate was the "regular rate," this states a fraud or breach of contract claim rather than a claim under the FLSA. See *Conner*, 428 F.Supp.2d at 637 (noting that "the only relevant inquiry under Section 207(a) [is] [w]hether or not Defendant properly calculated Plaintiffs' overtime pay," and denominating plaintiffs' claim that overtime should have been calculated on the basis of the posted 8-hour rate rather than the lower 12-hour rate a breach of contract claim).[76] The undisputed evidence

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documents. (See Coughlin Decl., Exh. 45 (showing both the base rate and blended rates on the offer letter).)

[74] Pl.'s Additional Facts, ¶ 10 (quoting Broomfield Depo. at 21:18-22:2).

[75] Pl.'s Additional Facts, ¶ 22. As noted, this claim misinterprets the evidence.

[76] At oral argument, Parth's counsel urged consideration of other factors that he asserted show there is really only one rate of pay for RNs at PVHMC. In particular, counsel cited the fact that 12-hour RNs are paid for PTO, meetings and orientation at the 8-hour rate. First, as noted, this misinterprets the evidence. The

shows that the base pay rates and the methodology for calculating RNs' "regular rate" for overtime purposes were explicitly set out in the CBA. To the extent Parth contests the validity or binding effect of the CBA, her argument concerns the formation and interpretation of the CBA as a matter of contract law or the validity of the bargaining procedures under the LMRA. These claims are distinct from the FLSA violation alleged here.[77] See *Hartsell v. Dr. Pepper Bottling Co. of Texas*,

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undisputed evidence shows that 12-hour shift RNs are paid their base wage rate unless they work *extra* shifts. Only a 12-hour RN who has worked the minimum number of shifts receives the Job 2 rate for extra shifts or meetings. More fundamentally, the court concludes that this fact does not support an inference that there is only one true rate. Parth cites no authority for the proposition that it violates the FLSA to pay PTO at a higher rate than the base rate of pay. The FLSA explicitly provides that vacation pay is not included in calculating the regular rate. 29 U.S.C. § 207(e)(2). Thus, paid vacation time is viewed as distinct from time worked at the regular rate. Furthermore, as commentators have noted, the FLSA contains no requirement that vacation time be paid. See Juliet B. Schor, Worktime in Contemporary Context; Amending the Fair Labor Standards Act, 70 CHI.-KENT L. REV. 157, 171 (1994) (noting that the FLSA has no mandatory vacation provision and arguing that "[t]he FLSA should ensure that workers are eligible for vacation time, regardless of their length of service");see also Gretchen Agena, What's So "Fair" About It?: The Need To Amend The Fair Labor Standards Act, 39 HOUS. L. REV. 1119, 1137 (2002) (noting a number of proposals by commentators to add mandatory vacation to the FLSA). Thus, the fact that PVHMC pays 12-hour RNs PTO at the Job 2 rate does not show that the Job 1 rate is a subterfuge, or not "real." Rather, it demonstrates that the higher vacation wage was part of the bargained-for rate negotiated by the union and PVHMC.

[77] In so observing, the court is mindful of the Supreme Court's statement that parties cannot contract out of the requirements of the FLSA. See *Barrentine*, 450 U.S. at 740 ("we have held that

207 F.3d 269, 274 (5th Cir. 2000) (where overtime was calculated properly, "[e]ven assuming some form of breach of contract by Dr. Pepper, that is *not* equivalent to a FLSA violation"); see also *Barrentine*, 450 U.S. at 739 (holding that an FLSA claim would lie even when plaintiff was bound under the LMRA to arbitrate because, "in contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers").

The only question that is relevant in assessing whether there has been a violation of the FLSA is whether overtime was correctly calculated based on an appropriately determined "regular rate." See 29 U.S.C.

FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate," collecting cases). Rather, the court affirms the rule that the "regular rate of pay cannot be left to the declaration of the parties . . . it must be drawn from what happens under the employment contract." *Bay Ridge Operating Co.*, 334 U.S. at 424. The court does not rely on the CBA to determine the regular rate, but it does rely on the CBA to determine what the actual rates that the parties have agreed to be paid are. As the proof before the court shows, the actual rates paid to Parth conformed with the rates of pay agreed to in the CBA. To the extent that there is some dispute over the significance of those rates, that dispute is contractual in nature. The FLSA does not govern the creation or interpretation of CBAs, instead the statute looks myopically at the question of whether overtime pay has been properly calculated. That is an objective question under the actual performance of the CBA.

§ 207(a).[78] Parth proffers no argument or support for the proposition that the regular rate for 12-hour RNs was not properly determined, or that overtime pay was not properly calculated using the pay rates set out in the CBA. In fact, PVHMC appears to have calculated Parth's overtime compensation in conformity with the dictates of 29 C.F.R § 778.115, which addresses "[e]mployees working at two or more rates." See 29 C.F.R. § 778.115. Parth's "total earnings" were "computed to include [her] compensation during the workweek from" both her weekend and weekday work rates. See *id.* That total was then divided by the number of hours worked to obtain the regular rate. See *id.*[79] Use of such a weighted average has been approved in situations where employees are paid at two rates during a given work period. See *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 595-96 (2d Cir.2007) (where a CBA set basic, evening premium and night premium rates, and employees worked at different rates in a given week, "the regular rate should be derived from the total compensation paid to an employee in a given pay period divide by the number of hours worked"); *Allen*, 495 F.3d at 1311 ("When a driver drives a combination of regular and other routes, and receives two different rates of pay, then the combined pay for those rates must be used in

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[78] The binding effect of the CBA may be relevant in determining whether § 207(j) has been effectively invoked. Before an employer may pay employees on the basis of an 80-hour, 14-day work period, there must be an "agreement" between the parties. See 29 U.S.C. § 207(j). Parth presents no evidence that the parties did not agree to adopt a 14-day work period.

[79] As noted, this calculation yields a "regular rate" of $44.571. (Def.'s Facts, ¶ 57.)

calculating all remuneration for employment. The total remuneration for employment is then divided by the total number of hours actually worked in that workweek"); *Chao v. Casting, Acting and Sec. Talent, Inc.*, No. CIV.A. 00-03481-RSWL, 2001 WL 1816648, *8 (C.D. Cal. Nov. 27, 2001) (stating that when employees are paid "premium pay" for a given workweek, that premium pay should be included in the "weighted average" calculation that determines the "regular rate").

Parth, in fact, does not dispute that PVHMC properly calculated what it calls the "regular rate" using the base and weekend rates set out in the CBA. She simply disputes that the calculated rate should be considered the "regular rate," and contends instead that the "blended rate" should be considered the "regular rate."[80] As the court finds this argument unavailing, it concludes that the undisputed evidence in the record demonstrates as a matter of law that PVHMC calculated the regular rate in accordance with the dictates of the FLSA.

b. The Goals of the FLSA

Parth contends more generally that PVHMC's pay plan is contrary to the underlying purposes of the

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[80] In fact, it is the "blended rate," rather than the 12-hour shift "regular rate" that is artificial. The FLSA requires that the regular rate "reflect all payments which the parties have agreed shall be received regularly during the workweek." See *Youngerman-Reynolds*, 325 U.S. at 424-25. At no time was Parth ever paid according to the "blended rate" for any hour of work she performed. Instead, she was paid according to the rates set out in the CBA, and her overtime was calculated accordingly.

FLSA. As noted, the FLSA was enacted to remedy "the evil of overwork as well as underpay." *Overnight Motor Transport, Co. v. Missel*, 316 U.S. 572, 578 (1942); see also *Barrentine*, 450 U.S. at 739 ("The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours," citing 29 U.S.C. § 202(a)). Parth asserts that PVHMC's pay plan is designed to avoid overtime costs and circumvent the FLSA's limits on the maximum hours of work.[81]

Parth's suggestion that PVHMC has attempted to avoid paying overtime lacks evidentiary support. The undisputed evidence shows that PVHMC pays 12-hour shift RNs overtime when they work more than 8 hours in a day or 80 hours over 14 days, albeit not at the overtime rate for 8-hour shift RNs.[82] That the regular rate for 12-hour shift RNs is lower than the rate for 8-hour shift RNs does not negate the fact that PVHMC

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[81] Pl.'s Opp. at 8-9.

[82] As noted, payment schemes that have been found to be artificial are plans in which employers have sought either to replace hourly wages with some other form of compensation to avoid paying overtime (see 29 C.F.R. 778.500(a)); to create a flexible payment plan in which the pay rate decreases as weekly hours increase (see *id.*, § 778.500(b)); or to create a "split-day" plan that rolls the overtime payment into the regular rate payment. (See *id.*, § 778.500(d).) These schemes all ensure that, when an employee works more than the maximum number of regular rate hours permitted by the FLSA, the employer will not have to pay an overtime premium. Under the plan at issue here, there is no such concern. There is no dispute that PVHMC pays an overtime premium for all hours worked beyond 8 in a day and 80 in a week.

properly calculates and pays overtime to 12-hour shift RNs at the rates set out in the CBA.

Parth's suggestion that PVHMC has attempted to circumvent the maximum hour requirement of the FLSA is similarly unsupported. Parth contends that PVHMC prefers the pay plan at issue because it allows it to avoid paying overtime to RNs who work more than three 12-hour shifts in a week.[83] The pay plan, however, honors the maximum hour requirement set forth in § 207(j). PVHMC reached agreement with the RNs to implement an 80-hour workweek. Thus, as long as it pays overtime for hours worked in excess of 80 in a 14-day period, there is no violation of § 207(j)'s maximum hour limitation.[84] Parth has presented no evidence that PVHMC does not pay overtime for hours worked beyond 80.[85]

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[83] Pl.'s Opp. at 9.

[84] Under § 207(j), PVHMC must also pay overtime for hours worked in excess of eight per day. As noted, PVHMC pays overtime on the last four hours worked by a 12-hour shift RN at the rates set out in the CBA.

[85] The illogical nature of Parth's claim is illustrated by the following hypothetical: If an RN worked 60 hours (or five 12-hour shifts) in a given 7-day period, that same RN would begin to receive overtime compensation after working only *20 hours (or 1⅔ shifts)* during the next 7-day period. Thus, while PVHMC might avoid overtime payments in the first week, in the second week, overtime payments would be due after less than two days of work. This is the system dictated by § 207(j), and an employer that utilizes it in no way circumvents the underlying maximum hour limitation of the FLSA.

D. Whether It Is Permissible to Pay Two Rates for the Same Work

Parth suggests it is improper for PVHMC to pay nurses performing identical work at two different rates. Parth cites the DOL regulations, which state that "where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked." 29 C.F.R. § 778.316. Courts have applied § 778.316 to schemes where an employer has sought to pay lower rates for work done during overtime. See *Ayers v. SGS Control Services, Inc.*, No. 03 Civ. 9077 RMB, 2007 WL 646326, *8 (S.D.N.Y Feb. 27, 2007) (finding that a bonus payment plan that penalized employees for not completing work within a 40-hour week was impermissible because it resulted in payment of a lower rate for work done during statutory overtime hours); *Schneider v. City of Springfield*, No. C-3-96-62, 2000 WL 988279, *9 (S.D. Ohio Mar. 30, 2000) ("[Section 778.316] merely recites the proposition that an employer may not set one hourly rate for the first 40 hours of work and a lower hourly rate for statutory overtime hours, nor provide no pay for overtime hours"). The payment plan at issue does not pay a lower rate for work done during overtime, however. Rather, the lower rate is applied across the board to all hours of the 12-hour shift.

Courts have routinely approved the payment of different base rates for work that is identical in nature but performed during shifts of different lengths. *Conner*, for example, held that such a practice is permissible when adopted as part of a CBA. See

Conner, 428 F.Supp.2d at 636. The Eleventh Circuit, moreover, reviewing a case in which bus drivers were paid different rates for different routes, held that "the regulations [do not] mandate that different types of work be performed if different rates are paid." *Allen*, 495 F.3d at 1312; *id.* at 1313 (stating that § 778.115 "does not mandate that differing rates of pay are only permitted when different types of work are performed");[86] see also *Gorman*, 488 F.3d at 595 (approving a three- tiered compensation system for employees at a power plant depending on the shift worked).

The undisputed facts demonstrate that there is no qualitative difference between the work done by 8-hour shift and 12-hour shift RNs. Even so, it does not follow that the two jobs are "identical." When an RN chooses one shift plan or the other, she determines the pattern and shape of her work and time off. Few would argue that there is "no difference" between a job that allows for two days off versus a job that allows for four days

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[86] *Allen* also holds that use of the weighted average methodology – combining different rates of pay for the same type of work to calculate the regular rate – is appropriate. See *Allen*, 495 F.3d at 1313. At oral argument, Parth's counsel attempted to distinguish *Allen* on the basis that the different bus routes in *Allen* were distinct from the different length shifts at issue here. In *Allen*, regular school bus routes were paid one rate, while others, such as field trip routes and after-school routes, were paid a different rate. *Id.* at 1310-11. The *Allen* court concluded that there was no difference between the routes and that they were, in fact, the same type of work. *Id.* While the bus routes in *Allen* are factually different than the 8-hour and 12-hour shifts at issue here, the court's holding that the same work can be paid at different rates remains relevant and persuasive.

off.[87] Even if the work is identical, the "job" itself is not.[88] The provision in the CBA that distinguishes between 8-hour shift and 12-hour shift RNs reflects a fundamental difference between the two jobs that cannot be dismissed simply because their job duties are the same.

E. Statute of Limitations

PVHMC also argues that Parth's claim is barred by the statute of limitations, as it is based on a decision she made in 1993 to elect a 12-hour shift. Parth made

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[87] The subjective value of time-off and flexible scheduling is reflected in the incentive rates PVHMC paid for night and weekend shifts. Weekend RNs perform identical tasks on Saturday night to RNs working on Tuesday morning. Yet they are paid at different rates. The choice of a 12-hour schedule rather than an 8-hour schedule is analogous. It is a personal choice about when to work (and how long to work) that carries a wage rate consequence. The fact that so many RNs elected the 12-hour shift payment plan when given the choice is a further indication that there is a real difference between the two jobs.

[88] At the argument, Parth's counsel argued that this case presents the question whether PVHMC can pay its employees more or less based solely on the amount of overtime they work. Evidence that the RNs chose this payment scheme, and that 12-hour shifts offer benefits such as additional days off and flexibility shows that there are differences between the 8-hour shift and 12-hour shift jobs beyond the amount of overtime worked. Moreover, the court in *Conner* addressed this question and determined that setting different rates for different length of shift did not violate the FLSA. See *Conner*, 428 F.Supp.2d at 637. While the regulations (and courts) disapprove of rates that circumvent the payment of any overtime premium, no court has found that a plan in which the employer and employees agree to a lower regular rate and to payment of overtime based on that rate violates the FLSA. This is such a plan.

this election thirteen years before she filed suit. 29 U.S.C. § 255(a) provides that actions challenging violations of the FLSA "may be commenced within two years after the cause of action accrued." 29 U.S.C. § 255(a). The court must thus examine when Parth's cause of action accrued. The Ninth Circuit has suggested that "FLSA claims are continuing claims and a separate cause of action 'accrues' every payday that overtime is not paid." *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) (citing *Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981)); see also *McIntyre v. Division of Youth Rehabilitation Servs.*, 795 F.Supp. 668, 674 (D. Del. 1992) ("The courts have adopted a uniform approach on this issue. Under the FLSA 'a separate cause of action accrued each payday when the [employer] excluded the overtime compensation they claim,'" quoting *Beebe*, 640 F.2d at 1293). *Biggs* held, in the context of an unpaid minimum wage violation, that a cause of action accrues on the day the employee's paycheck was supposed to be issued. See *id.* ("Statutes of limitation have to start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages (which are merely double the amount unpaid) accrues is the day the employee's paycheck is normally issued, but isn't"). As all these cases make clear, an overtime violation is ongoing, and is not be barred simply because the practice began long ago.[89] Rather, that fact will affect the amount of

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[89] PVHMC cites authority suggesting that if the injury was based solely on a single violation that occurred outside of the statute of limitations, "the later effect of this act does not constitute a continuing violation of the statute." *Hendrix v. Yazoo City*, 911 F.2d 1102, 1104 (5th Cir. 1990). This case stands for the proposition that *discrimination* that is solely the result of a single

damages that are recoverable. For this reason, the court finds that Parth's claims are not barred by § 255(a).

F. Conclusion Regarding The Legality of the Payment Plan Under the FSLA

Because Parth has not adduced evidence that that PVHMC's payment plan violates the FLSA's maximum hour and overtime requirements, PVHMC is entitled to have summary judgment entered in its favor. To prove a violation, Parth was required to show that PVHMC miscalculated her overtime or set an artificial base pay rate to avoid the requirements of the Act. At most, Parth's evidence demonstrates that there is a contractual dispute regarding the proper interpretation and effect of the rate provisions in the CBA. In the absence of evidence that the FLSA has been violated, there is no genuine issue of material fact regarding Parth's FLSA claim and summary judgment on the claim is appropriate.

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violation will not be considered a continuing violation if the effects of the discrimination occur outside the statute of limitations. See *id.* (citing *United Airlines v. Evans*, 413 U.S. 554 (1997); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989)). This rule does not easily translate to the present case where the violation alleged is not a discriminatory act, but rather a continuing miscalculation of overtime pay.

III. CONCLUSION

For the reasons stated, the court grants PVHMC's motion for summary judgment.

DATED: December 5, 2007

/s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55022
D.C. No. CV-06-04703-MMM

[Filed November 18, 2010]

LOUISE PARTH, individually and on behalf of all others similarly situated, *Plaintiff-Appellant*,	)
v.	)
POMONA VALLEY HOSPITAL MEDICAL CENTER, a California corporation, *Defendant-Appellee*.	)

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted
April 13, 2009—Pasadena, California

Filed November 18, 2010

Before: William C. Canby, Jr., Johnnie B. Rawlinson, and Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith

COUNSEL

Frank J. Coughlin, Santa Ana, California, for the plaintiff-appellant.

Douglas R. Hart and Beth Anne Scheel, Los Angeles, California, for the defendant-appellee.

ORDER

This court's opinion filed October 22, 2009, and reported at 584 F.3d 794, is withdrawn, and is replaced by the attached Opinion.

The petition for rehearing and the petition for rehearing en banc, filed November 9, 2009, is DENIED.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

[Opinion, as amended by Order dated December 13, 2010, is reproduced in this appendix at 1a]

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55022
D.C. No. CV-06-04703-MMM
U.S. District Court
for Central California, Los Angeles

[Filed December 13, 2010]

LOUISE PARTH, individually and on behalf of all others similarly situated,	)
Plaintiff - Appellant,	)
v.	)
POMONA VALLEY HOSPITAL MEDICAL CENTER, a California Corporation,	)
Defendant - Appellee.	)

MANDATE

The judgment of this Court, entered November 18, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate procedure.

Costs are awarded to the appellee in the amount of $696.09.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

Synthia Walker
Deputy Clerk

APPENDIX E

EXHIBIT B TO BRIEF OF AMICUS CURIAE SECRETARY OF LABOR

[Filed June 23, 2010]

1989 WL 1632939 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion LetterFair Labor Standards Act (FLSA)

April 27, 1989

***

This is in further response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to a public employer client whose employees have requested that their current 8-hour workshifts and scheduled 40-hour workweek be changed to 12-hour workshifts with alternating scheduled workweeks of 36 and 48 hours. We regret the delay in responding to your inquiry.

You state that your client would like to accommodate the employees' request to change their work schedules. However, the employer is not willing to increase its costs for overtime premium pay, which would be required for the longer 48-hour workweek under the proposed alternating workweek schedule. You indicate

that the employees have devised a reduction in base hourly rates which, together with overtime premium pay, will yield the current wage payments in order to meet your client's objective of not increasing costs. You ask whether a reduction in hourly rates, as devised by the employees to accommodate the proposed schedule changes they are requesting, would be prohibited by section 8 of the Fair Labor Standards Amendments of 1985.

Section 8 of the Amendments provides that a public agency which discriminates against an employee with respect to the employee's wages or other terms or conditions of employment, because on or after February 19, 1985, the employee asserted coverage under the overtime pay provisions of section 7 of FLSA, shall be held to have violated section 15(a)(3) of FLSA. Section 15(a)(3) prohibits discrimination against any employee who, among other things, has filed any complaint or instituted any proceeding under or related to FLSA. The Conference Report on the Amendments makes clear that the provisions of section 8 are "intended to apply where an employer's response to an assertion of FLSA coverage is to reduce wages or other monetary benefits for an entire unit of employees" (page 8 of Conference Report 99-357). As further explained in the Conference Report, the discrimination provisions of section 8 are intended to make unlawful "(a) unilateral reduction of regular pay . . . that is intended to nullify . . . application of overtime compensation to State and local government employees . . . ."

Based upon the information you have provided, it is our opinion that the proposed reduction of the employees' hourly rates does not constitute a violation

of section 8 of the Amendments. Further, we conclude that the reduced hourly rates, which are intended to implement the 12-hour shift plan proposed by the employees, comply with FLSA provided that the reduced rates constitute bona fide hourly rates. The reduced hourly rates would be bona fide if they are (1) agreed to by the employees, (2) operative for substantial periods of time, and (3) not less than the applicable minimum wage required by FLSA.

In summary, there is no provision in FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of FLSA. The establishment of rates of pay which are not less than the minimum wage required by FLSA is a matter for agreement between the employer and the employees or their authorized representative.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of FLSA.

Sincerely,

Paula V. Smith
Administrator

1989 WL 1632939 (DOL WAGE-HOUR)
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